# Detention and prosecution by non-state armed groups

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## Abstract

Detentions and prosecutions carried out by non-state armed groups have become an increasingly prominent issue, particularly due to the growing attention being paid to such organisations. While shocking reports of prisoner mistreatment have permeated the media, prohibiting these conducts, which are essential in warfighting and the maintenance of public order, is more harmful than accepting their existence. Among the scholarship, the dominant position regarding detention by non-state armed groups is that international humanitarian law implicitly allows for these operations. The discussion of the authorisation for prosecutions performed by these entities is less developed, the dominant position being that these acts are forbidden. This thesis posits that international humanitarian law neither authorises nor prohibits detentions by these groups. Instead, it leaves to each domestic jurisdiction the regulation of this conduct. This thesis proposes that, rather than being forbidden, or implicitly authorised by international law, prosecutions by non-state armed groups are equally relegated to domestic regulation. As such, instead of being based on an international humanitarian law framework, the procedural and judicial guarantees in detention and prosecution by these groups are a matter of international human rights law. This thesis defends the application of a sliding-scale approach, as proposed by Marco Sassòli, to determine how different non-state armed groups can comply with their legal obligations. This thesis suggests that, while varying in resources and territorial control, most non-state armed groups possess the capacity to comply with core obligations found in the international human rights law regulating these conducts. To comply with these core obligations, different approaches must be adopted, considering already existing practices, as well as solutions stemming from different legal systems worldwide.

*To my mum and brother, who encourage, sustain, and inspire me.*

*‘Há dor que mata a pessoa*
*Sem dó nem piedade.*
*Porém não há dor que doa*
*Como a dor de uma saudade’*
*– Patativa do Assaré*

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## Abbreviation table

Additional Protocol I – API

Additional Protocol II – APII

Additional Protocols to the Geneva Conventions – APs

African Charter on Human and Peoples' Rights – ACHPR

American Convention on Human Rights – ACHR

Common Article 1 – CA1

Common Article 2 – CA2

Common Article 3 – CA3

European Convention on Human Rights – ECHR

European Court of Human Rights – ECoHR

First Geneva Convention – GCI

Fourth Geneva Convention – GCIV

Geneva Conventions – GCs

Inter-American Court of Human Rights – IACHR

International Armed Conflict – IAC

International Committee of the Red Cross – ICRC

International Covenant on Civil and Political Rights – ICCPR

International Criminal Court – ICC

International Criminal Law – ICL

International Criminal Tribunal for Rwanda – ICTR

International Criminal Tribunal for the Former Yugoslavia – ICTY

International Human Rights Law – IHRL

International Humanitarian Law – IHL

Non-International Armed Conflict – NIAC

Non-state armed group(s) – NSAG(s)

Third Geneva Convention – GCIII

# Chapter 1 – Introduction

On the 16th of February 2017, the Stockholm District Court sentenced Syrian refugee Haisam Sakhanh to life in prison for the commission of war crimes.[1] Before seeking asylum in Sweden, Sakhanh had lived in Italy from 1999 to 2011, before embarking to Syria to join the Suleiman's Company, a rebel group fighting against governmental forces.[2] In the beginning of May 2012, a joint operation between the Suleiman's Company and Ahrar Alshamal Sermin Battalion, another anti-government non-state armed group (NSAG), against a Turkish military post ended with the capture of Syrian soldiers.[3] After being moved from the place of the attack, seven of the prisoners were sentenced to death and later executed by members of the Suleiman's Company. Sakhanh was identified as one of the rebels carrying out the sentence. As it was later established by the District Court, all of the executed prisoners displayed signs of extensive injuries due to ill-treatment during detention.[4] The detainees, who were *hors de combat*, were forced to bend down on their knees, while their hands were bound behind their backs, and then shot multiple times in their heads and bodies. In widely circulated footage of the executions, it is possible to identify Sakhanh shooting and killing one of the Syrian soldiers.[5]

During the proceedings, Sakhanh's defence raised the argument that the defendant had not violated International Humanitarian Law (IHL) by executing the prisoners, as they had been convicted of rape and murder by a court respecting fair trial

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[1] Marco Sassòli, Yvette Issar and Eleonora Heim, 'Sweden/Syria, Can Armed Groups Issue Judgements?' (*How does Law protect in war,* n/d), <https://casebook.icrc.org/case-study/swedensyria-can-armed-groups-issue-judgments> accessed 14 July 2020, par. 74.
[2] Mark Klamberg, 'The Legality of Rebel Courts during Non-International Armed Conflicts' (2018) 16(2) *Journal of International Criminal Justice*, 254.
[3] Marco Sassòli, Yvette Issar and Eleonora Heim, *supra* at 1, [c] and [d].
[4] *ibid*., pars. 15, 22-23.
[5] n/a, 'Syrian Rebel Gets Life Sentence for Mass Killing Caught on Video' (*The New York Times*, 16 February 2017) <https://www.nytimes.com/2017/02/16/world/europe/syrian-rebel-haisam-omar-sakhanh-sentenced.html?_r=1> accessed 14 July 2020.

guarantees.[6] The argument was refuted by the prosecution, that demonstrated that the minimum fair trial guarantees were not respected in the case. These ad-hoc, quasi-judicial, courts were composed of imams and judges who defected from the government, which applied a mixture of Islamic and Syrian law, and considered the mere participation in hostilities against rebel groups an offence punishable by death. Not only that, but the soldiers did not have their right to legal counsel respected, furthermore, they were not allowed to conduct their own defence or to appeal against a sentence. The evidence was presented by the members of the same groups that have convened the court and there was strong forensic evidence pointing to the use of torture during interrogation.[7] Finally, the trial of the seven detainees had occurred in only two days, between the 5th and 6th of May 2012.[8]

In an unprecedented judgement that drew considerable attention from the media and the international law scholarship, the Stockholm District Court considered whether NSAGs could establish courts and carry out sentences in order to maintain order and to punish violations of IHL. The District Court established that NSAGs could, in fact, uphold the law by the establishment of courts, but in the case in question, neither the court nor the sentences were legitimate. As a consequence, by participating in the execution of the Syrian soldiers despite being aware of the serious shortcomings in the judgement, Sakhanh was found guilty of committing serious violations of Common Article 3 (CA3) as well as generally recognised principles of IHL.[9] The judgement from the District Court was appealed, but the sentence was upheld by the

[6] *ibid.*
[7] Marco Sassòli, Yvette Issar and Eleonora Heim *supra* at 1, par. 50.
[8] Mark Klamberg, 'The Legality of Rebel…' *supra* at 2, 255.
[9] Marco Sassòli, Yvette Issar and Eleonora Heim, *supra* at 1, par. 68.

Svea Court of Appeals in May 2017,[10] as well as by the Swedish Supreme Court in July 2017.[11]

The series of decisions were notable not only by their bold approach to the problem, *i.e.* the recognition of NSAGs as entities capable of carrying out a function traditionally reserved to states, but also highlighted the importance of establishing minimum standards for detentions and prosecutions carried out by these NSAGs. Cases such as this are of particular importance not only due to their rarity but also because they shed the spotlight on a pervasive issue, which is the ignoring the detention and prosecutions by these entities.

## 1. Situating the debate

An indispensable element in warfighting, the taking of detainees is an undeniable reality in armed conflict, be it between states or between states and NSAGs. While it is generally recognised that NSAGs are regulated by IHL, the extent of the obligations imposed on these groups has only recently received a significant degree of attention. The problems involving the study of this topic are exacerbated by the significant differences between NSAGs. Factors such as organisation, territorial control, available personnel and resources, as well as popular support mean that, under the label 'armed groups', a wide spectrum of entities co-exists, from NSAGs bordering the capacity of a state to rebel groups operating barely above the level of criminal gangs.

The same can be said about sentences handed down by NSAGs. Very often, the prosecution of persons – civilians, members of states' armed forces, and other

[10] Svea Appeals Court (*Prosecutor v. Omar Sakhanh Haisam Sakhanh*, Svea hovrätt (Svea Appeal Court), B 2259-17, 31 May 2017.
[11] Swedish Supreme Court (*Prosecutor v. Omar Sakhanh Haisam Sakhanh*, Högsta domstolen (Supreme Court of Sweden), B 3157-17, 20 July 2017.

fighters alike – is a natural step from their initial detention. A soldier or a fighter, such as a member of another NSAG, will most likely face prosecution after capture. They could be charged with the commission of war crimes, since the lack of combatant status in Non-International Armed Conflicts (NIACs) could give cause to prosecution due to mere participation in hostilities, or much like the Syrian soldiers in the Sakhanh case, face accusations such as of rape and murder against unnamed victims. Civilians, on the other hand, could be found guilty of committing illicit acts unrelated to the armed conflict, as situations such as a civil war inevitably lead to some form of societal breakdown and creates an environment conducive to criminality. Additionally, the civilian population is especially vulnerable to acts of retribution or persecution, in the form of generic accusations of 'collaboration' with the government or rival NSAGs.

Despite the negative opinion towards such actions being executed by NSAGs, it is important to acknowledge that taking prisoners and passing of sentences is a common occurrence even in these organisations. As such, rather than flatly denying the mere concept of jungle justice, as it was aptly put by Jonathan Somer,[12] studying these incidents and engaging with NSAGs is potentially much more beneficial to those under the power of these actors across the world.[13] Considering the relative novelty of, as well as the relevance of these topics, this thesis will explore whether these two forms of conduct – *i.e.* detentions and prosecutions carried out by NSAGs

[12] Jonathan Somer, 'Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict' (2007) 89(867) *International Review of the Red Cross*.

[13] The evidence of such positive impact can be seen abundantly throughout the scholarship. See, for instance, Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law' (2010) 1(1) *International Legal Studies*; Ezequiel Heffes, 'Generating Respect for International Humanitarian Law: The Establishment of Courts by Organised Non-State Armed Groups in Light of the Principle of Equality of Belligerents' (2015) 18 *Yearbook of International Humanitarian Law*; and Anyssa Bellal and Ezequiel Heffes, '"Yes, I do": binding armed non-state actors to IHL and human rights norms through their consent' (2018) 12(1) *Human Rights and International Discourse*.

– can be legally performed under international law. Additionally, stemming from these questions, the mandatory procedural safeguards and judicial guarantees to be applied in such situations will be analysed. By determining the existence of a legal basis in international law, or elsewhere, for these acts, it is possible to establish not only the obligations that bind these groups, but also the extent of their responsibility for violations. The study of procedural safeguards and judicial guarantees applied in these situations allow, in their turn, for the creation of a minimum applicable framework that can be adapted to the different types of NSAGs, potentially serving as a tool for training and compliance.

### *1.A. Rebel justice in NIACs*

The first modern document regulating the international rules for the protection of the victims of armed conflicts would only come about years after Henry Dunant's contact with the horrors of war at the Battle of Solferino, and the founding of the International Committee of the Red Cross (ICRC).[14] It was not until the 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field that principles such as the protection of medical personnel and persons *hors de combat*, and the non-discriminatory treatment of the wounded and sick were gradually accepted as the standard of treatment on the battlefield.[15] Despite this general agreement on the minimum treatment to be dispensed to prisoners in situations of armed conflict, compliance with these rules has remained a challenge across the globe, evidenced by the tireless work of humanitarian organisations, most notably the ICRC.

[14] Pierre Boissier, *History of the International Committee of the Red Cross – From Solferino to Tsushima* (Henry Dunant Institute 1985), 7-83.
[15] Alexander Gillespie, Alexander Gillespie, *A History of the Laws of War – Volume 1: The Customs and Laws of War with Regards to Combatants and Captives* (Hart Publishing 2011), 160-161.

While the treatment of detainees in International Armed Conflicts (IACs) remains a source of concern, with countless reports of summary executions, prisoners being kept under inhuman conditions, as well as systematic torture, perhaps the most concerning scenarios involve prisoners in NIACs. The lack of resources, infrastructure, personnel, and stable control of territory propitiates conditions for violations to be committed.[16] These practical obstacles, coupled with an unequal legal framework for detention and prosecution in NIACs has allowed for acts such as the widely publicised executions and physical mutilations carried out by groups such as the Islamic State of Iraq and the Levant and Boko Haram.[17] Not only that, but the denial in the recognition of detentions as legitimate means of warfighting by NSAGs encourages the maintenance of detainees under conditions that often amount to ill or degrading treatment, while not providing any encouragement for such groups to follow the existent rules on the matter.[18] And to make matters worse, the illegitimacy to detain, coupled with the lack of recognition of the use of lethal force by these

[16] James Bond, 'Application of the Law of War to Internal Conflicts' (1973) 3 *Georgia Journal of International and Comparative Law*, 371, 375.

[17] Among the abundant sources available on the internet, see for instance 'ISIS Releases Video Showing Beheading of Alan Henning' (*NBC News*, 3 October 2014) <https://www.nbcnews.com/storyline/isis-uncovered/isis-releases-video-showing-beheading-alan-henning-n208816> accessed 18 June 2020; Martin Chulov and Shiv Malik, 'Isis video shows Jordanian hostage being burned to death' (*The Guardian*, 4 February 2015) <https://www.theguardian.com/world/2015/feb/03/isis-video-jordanian-hostage-burdning-death-muadh-al-kasabeh> accessed 18 June 2020; 'Nigerian 'youths executed' in Boko Haram stronghold' (*BBC News*, 2 November 2012) <https://www.bbc.co.uk/news/world-africa-20178356> accessed 18 June 2020; and Amanda Erickson, 'At least one kidnapped aid worker in Nigeria has been killed by Boko Haram' (*The Washington Post*, 15 October 2018) <https://www.washingtonpost.com/world/2018/10/15/frantic-plea-red-cross-warns-kidnapped-aid-workers-nigeria-may-be-killed-hours/> accessed 18 June 2020.

[18] See for instance, Rory Carrol, 'Farc rebels release hostage after 12 years in jungle' (*The Guardian*, 31 March 2010) <https://www.theguardian.com/world/2010/mar/31/farc-colombia-release-hostage> accessed 18 June 2020; 'Syria: Armed Groups Use Caged Hostages to Deter Attacks' (*Human Rights Watch*, 2 November 2015) <https://www.hrw.org/news/2015/11/02/syria-armed-groups-use-caged-hostages-deter-attacks> accessed 18 June 2020; and Ian Geoghean, 'War Crimes Victim Tells Tale Of Gruesome Torture' (*The Moscow Time*, 31 July 1996) <https://www.themoscowtimes.com/archive/war-crimes-victim-tells-tale-of-gruesome-torture> accessed 18 June 2020.

entities, makes the decision between summarily executing prisoners or keeping them under detention an easy choice in terms of resource expenditure.

This appears to be a bleak scenario for fighters and civilians in power of NSAGs, which is reinforced by the general public opinion that such organisations are always unwilling or incapable to comply with minimum standards for detentions and the dispensation of justice. Nevertheless, there are also plentiful examples of NSAGs striving to conduct themselves in accordance with the laws of war, providing detainees with the protection to which they are entitled under the laws of war, to the fullest extent of their organisational capacities. Perhaps the most famous example relates to the treatment of detainees by the *Movimiento 26 de Julio* (M-26-7) under Fidel Castro's command during the Cuban Revolution. The policy, determined by Castro himself,[19] was that, due to the lack of housing facilities and supplies, prisoners were disarmed and handed out to the Cuban Red Cross, who took the prisoners from inhospitable regions such as the Sierra Maestra, releasing them into more populated areas. A famous speech from Raul Castro to detained soldiers summarised this approach:

> *We hope that you will stay with us and fight against the master who so ill-used you. If you decide to refuse this invitation – and I am not going to repeat it – you will be delivered to the custody of the Cuban Red Cross tomorrow. Once you are under Batista's orders again, we hope that you will not take arms against us. But, if you do, remember this:*
>
> *We took you this time. We can take you again. And when we do, we will not frighten or torture or kill you ... If you are captured a second time or even a third ... we will again return you exactly as we are doing now.*[20]

[19] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012), 300.
[20] Cited in Michael Walzer, *Just and unjust wars: a moral argument with historical illustrations* (4th edn BasicBooks 2006), 360.

While NSAGs are often considered terrorist organisations by their adversaries, many of them have the declared goal of either toppling the ruling government or establishing a new state, becoming a *de iure* government themselves. In order to demonstrate their commitment to the international legal order and their capacity to effectively administer territory, these groups often attempt to conduct themselves as states. These duties usually entail respecting the international norms applicable to detention and prosecutions and at times creating their own rules. The Sudan People's Liberation Movement-North (SPLM-N) for instance determines that *'*(…) [i]*n the case of 'prisoners of war', they are detained in the military prison until the ICRC collects them, or they are released, which usually occurs. This is not a prison per se, but rather a field with a demarcation around it and armed persons guarding it* (…)*'*.[21]

Similarly, the convening of judgements and the handing down of sentences by these organisations do not necessarily entail the violation of international law. Many of the most organised NSAGs have created judicial systems to handle the administration of the civilian population in controlled territory, internal discipline, as well as violations of IHL and war crimes. The Liberation Tigers of the Tamil Eelam (LTTE), for instance, a Sri Lankan NSAG that controlled vast territories in the north and east of the country at the height of its power, was particularly concerned with dispensing appropriate justice in its territory. In order to achieve this, the LTTE created a complex state-like judicial system borrowing from Sri Lankan, Indian and the British legal systems. This judicial architecture was complex, with specialised District Courts, High Courts, Special Courts, and a Court of Appeals, as well as a Law

[21] Footnote omitted. Geneva Call, 'Administration of Justice by Armed Non-State Actors – Report from the 2017 Garance Talks' (2018) 2 *The Garance Series*, 12.

College to train public officials and legal practitioners.[22] Despite criticisms,[23] the structure devised by LTTE was unprecedented, demonstrating commitment to create a legislative branch capable of complying to the most stringent requirements of fair trial.

Oftentimes, courts such these are viewed more favourably by the population than those of the state, being perceived as less corrupt or more in tune with the reality of the population. The Shari'a courts established by the Taliban in Afghanistan, from 2002 to 2021, are often viewed as more reliable than the standard tribal justice that is widespread throughout the country. This system of justice is considered better organised, being conveyed by religious leaders, with about half of the population seeking their 'desert courts'.[24] The same can be said about the courts established by Communist Party of Nepal-Maoist (CPN-M) during the Nepalese Civil War, which were deemed more reliable than regular courts, which was perceived as being 'ran by nepotism', in addition to being considerably cheaper.[25]

Far from being exceptional, detention operations and dispensation of justice by NSAGs are frequent, as NIACs are much more prevalent than anticipated by the drafters of the Geneva Conventions (GCs). For instance, according to the latest

[22] Chris Kamalendran, 'The inside story of "Eelam Courts"' (*Sunday Times Sri Lanka*, 14 November 2004) <http://www.sundaytimes.lk/021208/news/courts.html> accessed 18 June 2020.
[23] For instance, see United States' State Department, *'Country Reports on Human Rights Practices (2006)*' (6 March 2007) <http://www.state.gov/j/drl/rls/hrrpt/2006/78875.htm> accessed 18 June 2020; *'Country Reports on Human Rights Practices (2007)'* (11 March 2008) <http://www.state.gov/j/drl/rls/hrrpt/2007/100620.htm> accessed 18 June 2020; and *'Country Reports on Human Rights Practices (2008)'* (25 February 2009) <http://www.state.gov/j/drl/rls/hrrpt/2008/sca/119140.htm> accessed 18 June 2020.
[24] This was examined at length by René Provost in his latest book, *Rebel Courts: The administration of Justice by Armed Insurgents* (Oxford University Press 2021), particularly in its chapter 2. For a journalistic approach, see, for example, Stefanie Glinski, 'Afghans flock to Taliban courts seeking swift justice' (*The National*, 20 May 2019) <https://www.thenational.ae/world/asia/afghans-flock-to-taliban-courts-seeking-swift-justice-1.864063> accessed 18 June 2020.
[25] Charles Haviland, 'Parallel justice, Maoist style' (*BBC News*, 14 October 2006) <http://news.bbc.co.uk/1/hi/world/south_asia/6048272.stm> accessed 18 June 2020.

numbers from the RULAC: Rule of Law in Armed Conflicts by the Geneva Academy of International Humanitarian and Human Rights Law, there are approximately 55 IACs, as opposed to more than 70 NIACs.[26]

Traditionally, during IACs, most situations of detention and prosecution were divided between those applicable to civilians, and those relating to prisoners of war, which included combatants and exceptionally civilians connected to the armed forces.[27] This was a direct consequence of the state of affairs when the Conventions of 1949 were negotiated, with the majority of the conflicts being of international character. Markedly, these conflicts generally involve readily identifiable armed forces and, for the most part, clearly identified borders. These procedures, that were consigned to law in the Third Geneva Convention,[28] were quite extensive,[29] in opposition to those regulating the NIACs, which were relegated to a single article with a vague and quite unhelpful text.[30] The reasoning behind this unequal treatment was the explicit concern that the application of IHL to NIACs could potentially legitimise insurgent groups and risk the sovereignty of the states involved in these conflicts. Consequently, a compromise text was adopted, including a vague definition of NIAC and a set of guiding principles.[31]

This compromise was not only insufficient in its definition, but the reality it attempted to regulate, particularly in the Fourth Geneva Convention, was already obsolete by

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[26] Geneva Academy of International Humanitarian and Human Rights Law, *'RULAC: Rule of Law in Armed Conflicts'* (2023) <https://www.rulac.org/> accessed 07 June 2023.
[27] Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019), 259-262.
[28] Geneva Convention (III) relative to the Treatment of Prisoners of War (Geneva Convention III). Geneva, 12 August 1949.
[29] The level of detail paid to these procedures can be verified, for instance, in Howard S. Levie's pivotal book, *Prisoners of War in International Armed Conflict – International Law Studies, vol. 59* (Naval College Press: Newport, Rhode Island, USA 1978).
[30] Common Article 3 to the Geneva Conventions of 1949 (Common Article 3).
[31] Sandesh Sivakumaran, *The Law of Non-International… supra* at 19, 41-42.

the time the Conventions were enacted.[32] As Sassòli very aptly noted, *'IHL is always a war behind reality*.'[33] This deficiency led to yet another attempt to regulate – and this time, to expand – the legal regime applicable to NIACs. At the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, that lasted from 1974 to 1977, states attempted to move away from a declaration of principles to a set of clearly defined rules.[34] The result of this Conference was the signature of two Additional Protocols to the GCs. Additional Protocol I (API), regulates armed conflicts fought in the context of decolonisation,[35] effectively turning these conflicts from NIACs into IACs. On the other hand, Additional Protocol II (APII), was created with the intention to *'expand and supplement'* CA3, without altering its scope of application.[36]

API was never to be effectively applied in the context of the wars of decolonisation, mostly due to its highly subjective and politicised content,[37] being applicable to *'armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes'*,[38] an accusation that very few states would be willing to make. On the other hand, the framework created with APII has been applied concurrently with CA3, although in a much more limited fashion. Despite the attempt to create a more workable set of rules to be applied in NIACs, APII added an

[32] Robert Kolb, *Ius in bello : le droit international des conflicts armés : précis* (2 edn. Helbing & Lichtenhahn 2009), XXX.
[33] Marco Sassòli, *International Humanitarian Law: Rules… supra* at 27, 9.
[34] Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press 2010), 87.
[35] Article 1(4), Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I). Geneva, 8 June 1977.
[36] Article 1(1), Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II). Geneva, 8 June 1977.
[37] Sandesh Sivakumaran, *The Law of Non-International… supra* at 19, 118; Anthony Cullen, *The Concept of Non-International… supra* at 34, 63-86.
[38] Additional Protocol I.

additional layer of complexity to the discussion. Not only a NIAC could be subjected to one of two distinct legal instruments, but the differentiation between them would rest in abstract elements such as a perceived heightened level of organisation and territorial control on the part of the rebel groups involved.[39]

Two of the most problematic topics resulting from this construction of the law of NIAC are detention and prosecution, particularly when taking into consideration the obligations imposed on NSAGs. For instance, despite producing a clearer set of norms regulating detention conditions, APII failed at differentiating a situation of legal detention from one of hostage-taking,[40] much like CA3.[41] A similar problem can be found when attempting to regulate prosecutions. The lack of provisions differentiating dispensation of justice carried out by states and NSAGs have led to claims from part of the scholarship that the latter could not prosecute persons in the context of a NIAC. This argument was put forward due to perceived practical and legal impossibilities[42] stemming from requirements such as that all sentencing must be handed down by a *'court'*,[43] or that *'no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed'*.[44] Despite the insufficient language of APII in relation to detention and prosecution carried out by NSAGs, the fact that the

[39] Additional Protocol II.
[40] *ibid*., art. 4(2)(c).
[41] Common Article 3(1)(b).
[42] See, for instance, Denise Plattner, 'The penal repression of violations of international humanitarian law applicable in non-international armed conflicts' (1990) 30(278) *International Review of the Red Cross*, 415-416.
[43] Article (6)(2), Additional Protocol II.
[44] *ibid.*, art. 6(2)(c).

majority of NIACs do not qualify for the Protocol's application due to a lack of organisation or territorial control means that, for the most part, CA3 applies.[45]

The regulation by means of CA3 allows for very broad criteria and requirements, considering that the article provides only guiding principles instead of clearly defined parameters for these conducts.[46] Paradoxically, the adoption of the lower-threshold framework for armed conflicts, found in CA3, also provides a far more stringent set of rules than those found on APII. When comparing the two requirements for the passing of sentences, it is clear that the text adopted by the Protocol, *i.e. 'a court offering the essential guarantees of independence and impartiality'*,[47] entails significantly less effort than the one found in CA3, which determines that *'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court* (…)*'*.[48]

Adding to this already complex, and sometimes contradictory legal structure, the application of International Criminal Law (ICL), which was consolidated by the Rome Statute only provides further challenges.[49] The truncated construction of Article 8(2)(f) [50] of the Statute gave rise to the argument that a possible third classification of NIACs exists.[51] Not only that, but also, the position adopted by the drafters of the

[45] Sandesh Sivakumaran, *The Law of Non-International… supra* at 19, 74.
[46] Common Article 3(1).
[47] Article (6)(2), Additional Protocol II.
[48] Common Article 3(1)(d).
[49] Sandesh Sivakumaran, *The Law of Non-International… supra* at 19, 77.
[50] Rome Statute of the International Criminal Court of 17 July 1998 Amended on 29 November 2010.
[51] See, for instance, Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law – Volume I: Outline of International Humanitarian Law* (ICRC 2011), Part I, Chapter 2 – International Humanitarian Law as a Branch of Public International Law, 23; and René Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press 2002), 268-269; as well as the jurisprudence of the International Criminal Court, such as in *Prosecutor v. Thomas Lubanga Dyilo*, Decision of Confirmation of Charges, (Pre-Trial Chamber I), ICC-01/04-01/06, 29 January 2007, par. 234; *Prosecutor v. Omar Hassan Ahmad Al Bashir ('Omar Al Bashir')*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, 4 March 2009, par. 60; *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to

Statute in relation to the prosecution of persons detained by NSAGs demonstrate the further lack of clarity brought both by statute and jurisprudence. Finally, the rise of the application International Human Rights Law (IHRL) in armed conflict, starting with landmark advisory opinions at the International Court of Justice[52] and gaining traction ever since, has provoked important debates on the interplay of these legal regimes. This is particularly evident in relation to NIACs, as well as the possible role of treaties such as the International Covenant on Civil and Political Rights,[53] the Convention Against Torture,[54] and the Mandela Rules[55] in relation to procedural safeguards in detention and judicial guarantees.

The study of IHL applicable in detention and prosecution procedures during NIACs has received little attention from the scholarship. With a few notable exceptions,[56] most of the research on the topic has been conducted under a predominantly state-centric perspective. A prominent example can be verified, in a series of very relevant blog posts published in EJIL Talk! discussing the existence of a legal basis for detention under IHL of NIAC.[57] Despite providing many original arguments, the

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Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, (Pre-Trial Chamber II), ICC-01/05-01/08, 15 June 2009, par. 233.

[52] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996 *(Nuclear Weapons advisory opinion)*; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004 *(The Wall advisory opinion).*

[53] International Covenant on Civil and Political Rights (ICCPR). 16 December 1966.

[54] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 4 February 1985.

[55] United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), Res. 70/175, 17 December 2015.

[56] Such as the seminal works of Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002); Sandesh Sivakumaran, *The Law of Non-International… supra* at 19, and 'Courts of Armed Opposition Groups: Fair Trials or Summary Justice?' (2009) 7 *Journal of International Criminal Law*; Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Non-State Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37(1) *Yale Journal of International Law*; as well as Jonathan Somer, 'Jungle justice: passing…' *supra* at 12.

[57] Marko Milanovic, 'High Court Rules that the UK Lacks IHL Detention Authority in Afghanistan' (3 May 2014) *EJIL: Talk!*; Kubo Mačák, 'No Legal Basis under IHL for Detention in Non-International Armed Conflicts? A Comment on Serdar Mohammed v. Ministry of Defence' (5 May 2014), *EJIL:*

discussion that took place addressed the situation of NSAGs as a secondary element, with the arguments revolving mostly around the consequences for states' armed forces. The same can be said about authoritative books, that also relegated these topics to incidental discussions.[58] Despite the recent increase in interest for detention operations conducted by NSAGs,[59] the issue of dispensation of justice by these entities has received significantly less attention.[60]

## 2. The evolving nature of NSAGs

The efforts to regulate NIACs and the reluctance on the part of states in addressing NSAG conduct, that has permeated the discussion up until quite recently, more concretely has led to different frameworks covering different scenarios, i.e. low and high-threshold armed conflicts, oftentimes in an overlapping and contradictory

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*Talk!*; Lawrence Hill-Cawthorne and Dapo Akande, 'Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?' (7 May 2014), *EJIL: Talk!*; Aurel Sari, 'Sorry Sir, We're All Non-State Actors Now: A Reply to Hill-Cawthorne and Akande on the Authority to Kill and Detain in NIAC' (9 May 2014) *EJIL: Talk!*; Lawrence Hill-Cawthorne and Dapo Akande, 'Locating the Legal Basis for Detention in Non-International Armed Conflicts: A Rejoinder to Aurel Sari' (2 June 2014), *EJIL: Talk!*; Sean Aughey and Aurel Sari, 'IHL Does Authorise Detention in NIAC: What the Sceptics Get Wrong' (11 February 2015), *EJIL: Talk!*; Rogier Bartels, 'IHL Does Not Authorise Detention in NIAC: A Reply to Sean Aughey and Aurel Sari' (16 February 2015), *EJIL: Talk!*; and Sean Aughey and Aurel Sari, 'IHL Does Authorize Detention in NIAC: A Rejoinder to Rogier Bartels' (24 February 2015), *EJIL: Talk!*.

[58] See, for example, Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict* (Oxford University Press 2016); and Els Debuf, *Captured in War: Lawful Internment in Armed Conflict* (Editions Pedone/Hart 2013).

[59] With important articles and books, such as Andrew Clapham, 'Detention by Armed Groups in International Law' (2017) 93(1) *International Legal Studies*; Sean Aughey and Aurel Sari, 'Targeting and Detention in Non-International Armed Conflict: *Serdar Mohammed* and the Limits of Human Rights Convergence' (2015) 91 *International Law Studies*; David Tuck, 'Detention by armed groups: overcoming challenges to humanitarian action (2011) 93(883) *International Review of the Red Cross*; Daragh Murray, 'Non-state armed groups, detention authority in non-international armed conflict, and the coherence of international law: searching for a way forward' (2017) 30(02) *Leiden Journal of International Law*; as well as Ezequiel Heffes, 'Detentions by Armed Opposition Groups in Non-International Armed Conflicts: Towards a New Characterization of International Humanitarian Law' (2015) 20(2) *Journal of Conflict and Security Law*, and 'Closing a Protection Gap in IHL: Disciplinary Detentions by Non-State Armed Groups in NIACs' (3 July 2018) *EJIL Talk!*.

[60] It is important to mention the few works that focussed substantially on these matters, such as Mark Klamberg, 'The Legality of Rebel…', *supra at* 2; Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016); Ezequiel Heffes, 'Generating Respect for International…', *supra* at 13; and Jan Willms, 'Courts of armed opposition groups – a tool for inducing higher compliance with international humanitarian law?' *in* Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law – Lessons from the African Great Lakes Region* (Cambridge University Press 2015), and 'Justice through Armed Groups' Governance – An Oxymoron?' (2012) 40 *SFB-Governance Working Paper Series.*

manner. Traditionally, the division between these different categories of NIAC are identified by different thresholds involving the different criteria established in treaties such as APII,[61] and in relation to the case law of ICL tribunals,[62] a combination of intensity of the conflict and the organisation capacity of NSAGs.

Although this division, between CA3 and APII conflicts, differentiates between lower-threshold and higher-threshold conflicts, it is not sufficiently granular to recognise the wide variety of NSAGs and the volatility that permeates their existence. Additionally, due to its origin in IHL, the division between low and high threshold NIACs ignores the existence of other legal regimes that are applicable during armed conflict, most prominently IHRL. Finally, by not providing a sufficient differentiation between NSAGs, this classification tends to brush off more nuanced approaches to NSAGs' behaviour that are highly dependent on organisational capacity and territorial control, such as detention operations and the dispensation of justice.

With this in mind, I submit that a more detailed analysis on the varying instances of NIACs should be conducted. This examination should emphasise more strongly NSAGs capacity and territorial control, in order to capture the great nuance that exists between NSAGs, as well as contemplate the application of other legal frameworks to such entities. This new classification preserves the lower end threshold of NIAC, with lower levels of violence and less organised NSAGs, that

[61] Notably Additional Protocol II, art. 1(1): *'This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts […] which take place in the territory of a High Contracting Party between its armed forces and* ***dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol****'* (emphasis added).

[62] With standard-setting definitions found in the International Criminal Tribunal for the former Yugoslavia decisions *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, and in the International Criminal Tribunal for Rwanda in *Prosecutor v. Jean-Paul Akayesu*, Judgement, ICTR-96-4-T, 2 September 1998.

normally possess a precarious territorial control and being only barely capable of respecting and enforcing respect for the GCs. Reaching increased levels of intensity and organisation, these groups become capable of not only of enforcing the GCs but also of controlling territory in a stable manner. With the progressive capacity to conduct complex operations, the laxer CA3 norms are gradually replaced by the dispositions found in APII. Finally, at the opposite end of this territorial control/organisation spectrum, it is possible to identify armed conflicts with similar levels of intensity to traditional higher-threshold IACs, yet, with highly organised NSAGs in exclusive control of territory. This last category, would encompass the upper-most levels of the already higher threshold for NIACs and would address those NSAGs with the capacity to perform state-like functions, possessing pseudo international legal personality.

These groups, being recognised as entities of international law for the performance of pertinent state functions – such as enforcing peace and order in the occupied territory, providing medical and educational services etc – would be subjected to other international law regimes, particularly IHRL, existing, as a consequence, in the limits between *de facto* or unrecognised states and recognised states.

### 3. Applying a sliding-scale of obligation to NSAGs

By choosing to focus on NSAG organisation levels with more detail, it is possible to observe that, as these groups capacities increases, so does the expectations that these organisations are able to comply with their obligations under IHL. On one side of this gradation, a disorganised group may be able to enforce the rules contained in the relevant provisions of CA3 and to punish their violations using the most rudimentary mechanisms. On the other, a highly organised NSAG, possessing extensive and exclusive territorial control, with an established ‘rebel parliament’ and

justice system is expected to fulfil the same obligations to a much higher standard, rivalling those expected of a sovereign state.

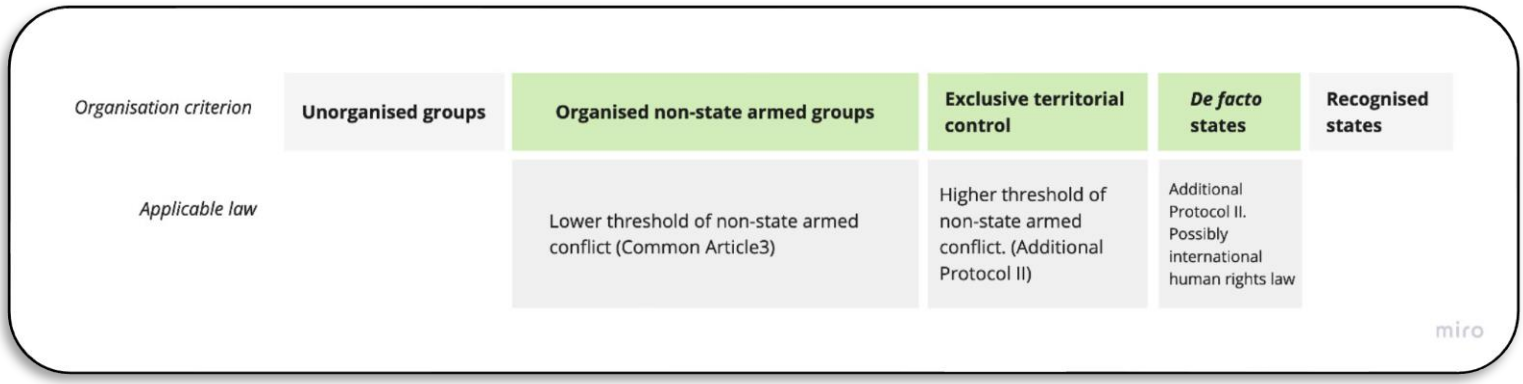


*Figure 1: organisation criterion vs. applicable law sliding-scale of obligations flowchart*

As can be noted from the flowchart above, the capacity to comply with international obligations operates in an axis of capacity x obligation. At the lower end, we have groups that fail to qualify as NSAGs due to their lack of organisation, and therefore would not be expected to comply with the applicable IHRL and IHL rules. This would include most drug cartels and other kinds of organised criminality.[63] The first level of obligation imposed would apply to groups with a lower level of organisation, such as the several volatile smaller groups currently operating in Syria.[64] These are the vast majority of NSAGs, being subjected to only the most rudimentary regulations, which are found in CA3. Above these groups, we have organisations operating under the higher organisational threshold. Groups such as the *Fuerzas Armadas Revolucionarias de Colombia* (FARC) from the mid-1990s until their unilateral truce

[63] Contrary to some scholarly positions, such as the one consistently adopted by the Geneva Academy of International Humanitarian and Human Rights Law's War Report publications, Jennifer Hazen presents a solid analysis on the fundamental differences between criminal gangs and non-state armed groups, as well as problems in attempting to address these criminal organisations under international humanitarian law lenses. See, Jennifer Hazen, 'Understanding gangs as armed groups' (2010) 92(878) *International Review of the Red Cross*, particularly 378-386.

[64] Geneva Academy of International Humanitarian and Human Rights Law, *'RULAC: Rule of Law in Armed Conflicts – Non-international armed conflicts in Syria'* (2023) <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria#collapse5accord> accessed 13 June 2023.

declaration in 2014 would fall in this category.[65] These groups are in possession of exclusive territorial control, and as such, have the opportunity to operate with a significant level of sophistication. At the grey zone between state and non-state actors, we have those groups who, due to the extent and stability of the territorial control exercised, operate as *de facto* states. These organisations, such as the Kosovo's KLA,[66] are not only subjected to the most stringent rules found in APII but may possibly have to comply with some IHRL obligations. By providing services such as policing, education and health, these groups fulfil state-like roles, and consequently possess state-like IHRL responsibilities. Finally, at the highest end of the scale, we have recognised states, to which IHRL and IHL were originally intended.

This sliding-scale theory of obligations is similarly presented by Sassòli.[67] It does not only acknowledge the inherent differences between states and NSAGs, and even between NSAGs themselves, but also recognises the necessity not to push this contextual interpretation of the rules beyond their breaking-point. This theory proposes an individual context analysis, as well as a general and *in abstracto* evaluation to be applicable to different categories of NSAGs.[68] The present thesis will utilise this theory as its paradigm for the interpretation the relevant IHRL and IHL norms.

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[65] Felicity Szesnat and Annie R. Bird, 'Colombia' *in* Elizabeth Wilmshurst (ed)*, International Law and the Classification of Conflicts* (Oxford University Press 2012), 227.
[66] Daragh Murray, *Human Rights Obligations… supra* at 60, 75-77.
[67] Marco Sassòli and Yuval Shany, 'Should the obligations of states and armed groups under international humanitarian law really be equal?' (2011) 93(882) *International Review of the Red Cross*, 426-431.
[68] *ibid.*, 430.

## 4. Methodological considerations

The current thesis will focus on detentions and prosecutions carried out by NSAGs under international law, both in situations of an armed conflict and outside such situations. Therefore, rather than concentrate on a specific legal regime, such as IHL, the research will address any field of international law that is relevant for the discussion. Despite this general approach, it is important to recognise the prominence of a few areas of law in discussing the overarching themes addressed in this thesis, which are IHL, IHRL and ICL.

Additionally, due to the dynamic nature of the topics, it is important to demarcate the point in which the present research was finished. In light of the very recent guidance released by the International Committee of the Red Cross (ICRC),[69] as well as the recent developments at the International Criminal Court,[70] this thesis will discuss detention and prosecution by NSAGs up until April 2023.

While these topics have been particularly unexplored, there have been a series of prominent scholars that contributed to greatly to determining the applicable framework to these issues. Having received significantly more attention as of late, detentions by NSAGs have been explored at length by Ezequiel Heffes, particularly in his latest book.[71] In his research he provides a detailed analysis of the place occupied by these non-state actors in the international legal architecture, as well as a comprehensive proposal for the applicable legal framework for detention operations carried out by these groups. Delving into the far less debated problem of

[69] International Committee of the Red Cross, *Detention by non-state armed groups – Obligations under international humanitarian law and examples of how to implement them* (ICRC 2023).
[70] The case of Al Hassan, a member of Ansar Eddine and the chief of the Islamic police working for the Islamic Court in Mali, has the potential to propel the discussion forward significantly. For more information, see International Criminal Court, 'Al Hassan Case' (*International Criminal Court*, n/d) <https://www.icc-cpi.int/mali/al-hassan> accessed 27 September 2023.
[71] Ezequiel Heffes, *Detention by Non-State Armed Groups under International Law* (Cambridge University Press 2022).

prosecutions carried out by NSAGs, it is important to emphasise the vital works by Katherine Fortin[72] and René Provost.[73] While Fortin's research is vital for the understanding the application of prescriptive jurisdiction to NSAGs and its relation to the legal basis for prosecutions, Provost's book examines meticulously the applicability of judicial guarantees in such a precarious context.

Despite their invaluable contribution, some elements that are crucial to the regulation of these procedures remain outstanding. Perhaps the most significant gap in the scholarship is recognising that detention and prosecution are interrelated, yet distinct, issues. This can be seen clearly in Heffes' approach, which addresses only the detention aspect of the problem, examining overlapping problems, like the nature of the adjudicative body reviewing the legality of detention, incidentally. Both Fortin and Provost adopt a similar approach in relation to prosecutions.

If on one hand Heffes focusses almost exclusively on detentions carried out during a NIAC, Fortin, on the other, seems to have devoted her research mainly to prosecutions outside of this setting, framing it in the wider context of rebel governance. Provost's approach, although more uniform, still emphasises armed conflicts.

Finally, although providing solid arguments for the legal basis for detention and prosecution, Heffes and Provost, respectively, seem to rely on arguments that have been decisively refuted by authors such as Lawrence Hill-Cawthorne.[74] Both jurists base their theories on the premise that not only there is a legal basis for detention and prosecution in international law, but that this authorisation is implicit in the

[72] Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017).
[73] René Provost, *Rebel Courts: The administration… supra* at 24.
[74] Lawrence Hill-Cawthorne, *Detention in Non-International… supra* at 58.

*corpus* of international law, particularly IHL. As demonstrated in Chapters 3 and 4, this theory is based on imprecise interpretations of existing norms and case-law, and although welcome, represent a construction *de lege ferenda* of the issue.

In the course of this thesis, I intend to bridge the two aspects of the wider NSAG criminal justice system, recognising the separate but complementary nature of detentions and prosecutions. Additionally, by exploring these topics both in and outside the context of NIACs, I will be able to provide comprehensive solutions, including in situations of uncertainty as to the applicable legal framework.

In order to conduct this analysis, it will be necessary to assess the scope of the legality of these procedures, evaluating the status of NSAGs under international law. This determination will include establishing their legal personality, their standing vis a vis states and their obligations under the relevant legal regimes. While the analysis of the role of NSAGs in the international legal order necessarily includes problems surrounding self-determination and statehood, considering the focus of this study, debates on the broader topics such as recognition and rebel governance will only be held insofar they are relevant to advance the main discussion. This investigation will set the baseline for the determination of the legality, or illegality, of detention operations and prosecutions, which, in turn, will allow for the establishment of minimum procedural standards for performing such functions.

In order to carry out this research, a critical analysis of secondary sources regarding these topics will be necessary, with particular emphasis to studies conducted by non-governmental organisations, such as the ICRC, Geneva Call, and Human Rights Watch. Additionally, both national and international jurisprudence will be analysed, including decisions by United Nations quasi-judicial bodies, regional systems and ad-

hoc international tribunals. Whenever relevant, national legislation will be presented to advance arguments and to provide concrete examples of the proposed sliding-scale approach.

The present research has as its main objective to answer the following questions:

- Is there a legal basis for detentions by NSAGs in international law?
- Is there a legal basis for prosecutions by NSAGs in international law?

As a consequence of the main research questions, it will also be necessary to answer the following complementary research questions:

- In case there is no legal basis for detentions by NSAGs in international law, how are the procedural safeguards involved in these operations to be determined?
- In case there is no legal basis for prosecutions carried out by NSAGs in international law, how are the judicial guarantees applicable to these procedures to be determined?

When discussing NSAGs, one must be aware that under this label a series of entities, with widely different backgrounds, are addressed, from the Marxist-Leninist FARC to the racist and pan-Arabist *Janjaweed* operating in Sudan and Chad; to groups with varying internal organisation structures, such as the Irish Republican Army (IRA) being organised under a hierarchical structure mimicking that of regular armed forces to the Communist Party of Nepal-Maoist (CPN-M), which, following its Marxism–Leninism–Maoism–Prachanda Path ideology, would make important decisions in assembly by a majority vote. Other aspects to be taken into account are their differing levels of capacity and development, ranging from the various groups in the ongoing Syrian Civil War that exist during short amounts of time, only to be

assimilated under bigger groups or to disappear completely, to groups such as *Hezbollah*, operating in southern Lebanon and acting as a *de facto* government and providing public services such as basic education, health care and policing in its extensive controlled territory. Despite an apparent absence of shared elements to legitimise their agglutination under this moniker, these groups do have a few characteristics in common. As non-state entities, these groups represent

> *'the armed wing of a non-state party to a non-international armed conflict, and may be comprised of either: a) dissident armed forces (for example, breakaway parts of state armed forces); or b) other organized armed groups which recruit their members primarily from the civilian population but have developed a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict.*
>
> *The term organized armed group refers exclusively to the armed or military wing of a non-state party to a non-international armed conflict. It does not include those segments of the civilian population that are supportive of the non-state party such as its political wing.'*[75]

It is important to highlight that, while the majority of NSAGs will be verified in the context of a NIAC, in a few instances these groups outlive these scenarios without successfully toppling the government against which they were fighting or successfully seceding their parent state and being recognised as a new state. In these few instances, these groups will have necessarily achieved exclusive and stable territorial control and are likely considered to possess limited international legal personality, being more akin to unrecognised states than to a traditional NSAG.[76]

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[75] Marco Sassòli *et al.*, 'Armed Groups (*How does Law protect in war,* n/d) <https://casebook.icrc.org/glossary/armed-groups> accessed 20 June 2020.

[76] It is important to highlight that, throughout this thesis, the expression 'non-state armed groups' will be used interchangeably with others such as 'armed groups', 'non-state actors', 'armed non-state actors', 'rebel groups', 'organised armed groups', 'organised non-State actors'. The different terminologies are adopted merely for literary purposes and in all cases denote the entities encompassed by the above definition.

In order to ground the discussions carried out in this thesis in practice, a series of NSAGs will be studied, and their practice presented, in order to better illustrate arguments and theories. Among other groups, the research will address the conduct of Lebanese group *Hezbollah*, the Sudan People's Liberation Movement – North (SPLM-N), Colombian *Fuerzas Armadas Revolucionarias de Colombia* (FARC), the multinational group operating in West Africa *Boko Haram*, the various minor NSAGs operating in the Syrian Civil War and in the Democratic Republic of the Congo, as well as the Donetsk People's Republic and the Luhansk People's Republic. Additionally, particularly pertinent historical examples will be used, such as Salvadoran *Frente Farabundo Martí para la Liberación Nacional* (FMLN), the Sri Lankan Liberation Tigers of Tamil Eelam (LTTE), the Islamic State of Iraq and the Levant during the period in which it held substantive territorial control over parts of Syria and Iraq, among others. With the intention to study the capacity of these entities to comply with the proposed framework for detentions and prosecutions, secondary research will be carried out, with the collection and analysis of documents such as codes of conduct, criminal codes, declarations of intent and agreements, reports from NGOs, international organisations and states, official armed groups' statements, and news articles. The research of these primary and secondary sources will be conducted, with particular emphasis to studies conducted by non-governmental organisations, such as the ICRC and Geneva Call. Additionally, international jurisprudence, including decisions by United Nations quasi-judicial bodies, regional systems and ad-hoc international tribunals, will be analysed, as well as, when relevant and feasible, decisions by municipal courts. As the analysis developed in this thesis will rely exclusively on desk-based research involving publicly available material, the need to seek ethical approval was not anticipated.

## 5. Chapter overview

The present thesis is divided in six chapters, approaching both problems as they are progressively presented in most situations, i.e. the legal bases for detention and prosecution are necessary prior to their execution, and the act of detention usually preceding prosecution.

The second chapter, ‘the application of international law to NSAGs’, focusses on the analysis of the existing international legal regime applicable to NSAGs, particularly IHL, IHRL, and ICL, and provides the conceptual base for the remainder of the research. The chapter is divided in two sections. The first section addresses the place of NSAGs in IHL and ICL concurrently, due to the existing interconnection between both fields. After situating the debate, the section examines the threshold of application for NIACs, analysing the elements of intensity and organisation that are necessary for the characterisation of an internal conflict, and the differing requirements for a lower threshold NIAC, regulated by CA3 of the GCs, and the higher threshold, regulated by APII. The second section concentrates on the application of IHRL to NSAGs. The section begins with a study on the applicable methods for conflict resolution between IHL and IRHL regimes. It continues with a discussion on the application of IHRL to NSAGs. In order to establish the requirements for the recognition of NSAGs as addressees of IHRL, it is necessary to study the manner in which entities unrecognised under international law acquire international legal personality, as well as the nature of this acquisition, with different theories being examined. Finally, having determined the conditions that lead to the bestowing of international legal responsibility, the gradated approach of the application of IHRL is presented, in preparation for the subsequent chapters.

Having laid the theoretical foundations of the research, chapter three, addresses the 'legal basis for detention'. It is devoted to an examination of the existence of a legal basis for detention by NSAGs under IHL and IHRL. It presents the main theories currently proposed, as well as the limited examples of states' *opinio iuris* and *praxis* in relation to the topic. After presenting these theories and their main aspects, the chapter re-analyses the existence of a legal basis for detentions carried out by NSAGs. Discussions on the legal basis for detention in NIACs either ignore the issue of NSAGs, or build an authorisation based on interpretations *de lege ferenda*. As such, this chapter will focus on extending the current understanding of the legal basis for detentions in NIACs to NSAGs by adopting a more concrete interpretation of the existing body of law in this respect.

Chapter four considers whether there is a legal basis for prosecutions. Once again, the discussion is divided between IHL, and IHRL, with an analysis of the main existing theories. After pointing the shortcomings in the scholarship, an alternative theory is presented, rooted in IHRL and application of the theory of prescriptive jurisdiction. The most prominent positions either adopt an overly idealised approach to the topic, relying on *de lege ferenda* interpretations as in the previous chapter, or dismiss peremptorily the possibility of NSAGs holding court. The theory proposed in this chapter offers a comprehensive protection to those more vulnerable to the gaps in legislation, while providing feasible expectations on the side of NSAGs.

After establishing the location of the authority to detain for NSAGs in chapter three, chapter five provides a closer analysis on the procedural safeguards that are to be respected when engaging in detention operations. As with the chapter on the legal basis for detention, most theories that have been developed to offer a set of procedural safeguards in detention that rely heavily on implicit interpretations of

existing legislation. Once again, this chapter provides a more pragmatic approach, relying on existing and amply accepted interpretations applied to NIACs, but extended to the realities of NSAGs. To achieve this, the Sassòlian concept of the sliding-scale of obligations is introduced, allowing for a balanced application of domestic procedural safeguards to these groups. Additionally, this chapter begins to fill an important gap in the scholarship, which is the bridging between procedural safeguards in detention and judicial guarantees in prosecution. While this idea continues in the final chapter, here, particular attention is paid to the intersection between detention and prosecution in the requirements of detention review procedures.

The final chapter, Judicial guarantees in prosecution, focusses on the judicial guarantees necessary to provide for a fair trial. Again, the approach adopted in this thesis is novel in the sense that it utilises a widely accepted set of guarantees, extending them to NSAGs trials. Moreover, the proposed theory presents a uniform legal regime for the different procedures that are addressed in this thesis, which are disciplinary trials, security detentions, and criminal prosecutions. The concept of a sliding-scale of obligations is once again utilized to present a nuanced approach to the distinct needs and possibilities of each scenario. Finally, making use of this gradated approach, some concrete solutions based on existing legal mechanisms are presented to demonstrate the adaptability of this approach.

# Chapter 2 – The application of international law to non-state armed groups

## 1. The application of International Humanitarian Law in Non-International Armed Conflicts

Prior to the 1949 Geneva Conventions (GCs), the only norm regulating the situation of NIAC was the Martens Clause, present in its final version at The Hague Regulations of 1907. It determined that

> *Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.*[1]

It is then understandable that, with the new set of rules that came about after the discussions held during the 1949 International Committee of the Red Cross (ICRC) Diplomatic Conference, the first specific efforts at regulating NIACs were undertaken.[2]

The result of the discussions, which saw an ample margin of approval for the extension of IHL to situations of NIAC,[3] was article 3, common to all the four Conventions. Once there was no agreement in regard to the application of the humanitarian rules to NIACs, the solution found by the delegates was to avoid defining an armed conflict of non-international character and to focus on the

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[1] Geneva Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land. Geneva, 18 October 1907, preamble.
[2] Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press 2010), 25; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012), 42; Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press 2002), 30.
[3] *Final Record of the Diplomatic Conference of Geneva of 1949* (Federal Political Department, Berne) Vol II-B, 45.

applicable rules instead.[4] The outcome was an open-ended scope of application and few substantive rules. The result that was far from ideal, but, as it was put by the Swiss delegate Plinio Bolla in his famous intervention: *'half a loaf is better than no bread.'*[5]

Attempts to improve the regulation of NIAC were once again materialised during the 1974-1979 Diplomatic Conference on the Reaffirmation and Development of IHL Applicable in Armed Conflicts in Geneva. The negotiations undertaken pointed out a wide range of opinions, and different views regarding the outcome of the conference.

While, a group of delegations favoured the adoption of a single protocol, which would encompass both International Armed Conflicts (IACs) and NIACs alike,[6] other group defended the adoption of two different protocols, arguing the notable distinction between the two kinds of conflict.[7] A third group held a compromising opinion, suggesting, while there should be two different protocols, they should be identical whenever possible.[8] On the other side of the spectrum, groups of states defended that the adoption of a protocol on wars of national liberation would render the regulation of NIACs useless.[9] Finally, another group considered that regulating

[4] Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 41; Lindsay Moir, *The Law of Internal… supra* at 2, 29.
[5] *Final Record of the Diplomatic Conference… supra* at 3, 335.
[6] For instance, see in the *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)* (Federal Political Department, Berne, 1978) the position of the Norwegian delegation, Vol 5, 91, par. 3; Australia, Vol 5, 149, par. 40; Finland, Vol 5, 186, par. 15; Syria, Vol 5, 193, par. 54; New Zealand, Vol 8, 218, par. 17.
[7] For example, *vide Official Records of... ibid*, the position of the delegation of Monaco, Vol 5, 108, par. 40; Portugal, Vol 5, 130, par. 19; Romania, Vol 8, 221, par. 33; Nigeria, Vol 8, 232, par. 17; Indonesia, Vol 11, 248, par. 18.
[8] See *Official Records of... ibid.*, for the position of the delegations of Egypt, Vol 5, 92, par. 8; Sweden, Vol 5, 142, pars. 6-7; Finland; Norway, Vol 11, 249, par. 21.
[9] *ibid*, India, Vol 5, 345-346, pars. 50-54, 379-381, pars. 4-8, Vol 8, 224, par. 48; Philippines, Vol 5, 351, par. 76; Iraq, Vol 5, 381, par. 9.

NIACs through international law would be an encroachment on state sovereignty, and as such, it should be left to states' domestic legislation.[10]

As a consequence to such an ample gamut of opinions, two Additional Protocols to the GCs, Additional Protocol I (API) addressing wars of national liberation as IACs, and Additional Protocol II (APII) regulating NIACs were adopted. API recognised wars of national liberation, adopting criteria much akin to that of belligerency, as IACs. Article 1(4) of API expanded the definition contained in Common Article 2 (CA2), but at the same time made its application inviable, even though being considered a significant victory for developing countries in the context of decolonialisation.[11] The terminology adopted in the article – *"colonial domination"*, *"alien occupation"* and *"racist regimes"* – was never clarified by said Protocol or in any subsequent treaty. The Commentary on the Additional Protocols to the Geneva Conventions (APs) by the ICRC then became a pivotal instrument in the identification of the scope of application of API.[12] Despite attempts to better define the language of the Protocol, the fact that states are resistant to be identified with

[10] *ibid*, Romania, Vol 5, 103, par. 15; India, Vol 5, 345, par. 50, Vol 8, *ibid*; Philippines, *ibid*.

[11] Cristopher Greenwood, 'A Critique of the Additional Protocols to the Geneva Conventions of 1949' *in* Helen Durham and Timothy L. H. McCormack (eds.) *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (Martinus Nijhoff 1999), 16; George H. Aldrich, 'Prospects for the United States Ratification of Additional Protocol I to the 1949 Geneva Conventions' (1991) 85(1) *American Journal of International Law*, 6-7; Anthony Cullen, *The Concept of Non-International… supra* at 2, 84-85.

[12] *"However, do the cases listed essentially cover all possible circumstances in which peoples are struggling for the exercise of their right to self-determination? The expression "colonial domination" certainly covers the most frequently occurring case in recent years, where a people has had to take up arms to free itself from the domination of another people; it is not necessary to explain this in greater detail here. The expression "alien occupation" in the sense of this paragraph - as distinct from belligerent occupation in the traditional sense of all or part of the territory of one State being occupied by another State -covers cases of partial or total occupation of a territory which has not yet been fully formed as a State. Finally, the expression "racist regimes" covers cases of regimes founded on racist criteria. The first two situations imply the existence of distinct peoples. The third implies, if not the existence of two completely distinct peoples, at least a rift within a people which ensures hegemony of one section in accordance with racist ideas. It should be added that a specific situation may correspond simultaneously with two of the situations listed, or even with all three."* Jean Pictet (ed), *Commentary on the Additional Protocols of June 8 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987), 54, par. 112 (footnotes omitted).

such depreciative and politically loaded terms makes its future application highly unlikely.[13] Considering that API addresses IACs, its content will not be discussed, except when necessary for the comprehension of the main argument of the thesis.

The adoption of API had the effect of weakening the efforts for the approval of a final version of the APII. Since some delegations were satisfied with the outcome of the first Protocol, they were not interested or did not see a point in the elaboration of a second document.[14] The lack of interest and the resistance to regulate matters seen by many delegations as strictly internal led to a document, which was based on API, but significantly shorter and "simplified".[15] From the 102 articles in API and the 47 proposed in its draft, APII was adopted containing 28 articles. Provisions such as the prohibition of some forms of belligerent reprisals, unnecessary suffering, perfidy, the creation of civil defence forces, information bureaus and impartial bodies providing services to the belligerents being markedly absent.[16] Despite the debate over the consequence of these omissions in APII,[17] the best position seem to be that, with a few exceptions, particularly the simplification of the article on penal prosecutions and the deletion of the prohibition on the application of death penalty until the cessation of hostilities,[18] the content of APII was not significantly compromised. Most of the concepts proposed in the draft protocol were maintained, although in an attenuated

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[13] Anthony Cullen, *The Concept of Non-International… supra* at 2, 84-85.
[14] Anthony Cullen, *The Concept of Non-International… supra* at 2, 85-86; Lindsay Moir, *The Law of Internal… supra* at 2, 91.
[15] Lindsay Moir, *The Law of Internal… ibid.*, 93; Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 49, 51.
[16] Lindsay Moir, *The Law of Internal… ibid*., 94-95; Sandesh Sivakumaran, *The Law of Non-International… ibid.*, 51.
[17] See for example, David P. Forsythe, 'Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts' (1978) 72(2) *American Journal of International Law*, 283; Lindsay Moir, *The Law of Internal… ibid.*, 94; Sandesh Sivakumaran, *The Law of Non-International… ibid.*, 51; Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' *in* Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, 34-35.
[18] Sandesh Sivakumaran, *The Law of Non-International… ibid.*, 51; Lindsay Moir, *The Law of Internal… ibid.*, 94.

form,[19] being the protocol, even in its initial draft, an orthodox instrument.[20] In addition to that, states were hesitant to give what could be perceived as means to legitimate to NSAGs by granting them obligations and rights under international law. Therefore, the less defined wording of APII has proven to be an underrated tool for the advancement of the regulation of NIACs, as well as to the erosion of the divide between the two recognised forms of conflict.

In comparison to the wording of Common Article 3 (CA3), the threshold of application set in APII is substantially higher, and its rules are more detailed. This disparity between regulatory frameworks has created a complex patchwork of rules and requirements. These norms can regulate different armed conflicts happening simultaneously in a same territory, as well as a single armed conflict spanning different time periods. The differing thresholds of application for the CA3 and the APII frameworks will be discussed below.

### *1.A. Law applicable to NIACs*

IHL, as well as the laws regulating NIAC, are a part of the legal regime of public international law, and as such the source of their regulation are the same. According to the Statue of the International Court of Justice (ICJ), the sources of public international law include treaties, international customary law and general principles of law.[21] Additionally, the court recognises judicial decisions and legal doctrine as subsidiary sources for the determination of the applicable law.[22] Finally, some other less impacting sources, such as declarations and agreements, bear some influence over the conduct of belligerents.

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[19] Sandesh Sivakumaran, *The Law of Non-International… ibid*.
[20] David P. Forsythe, 'Legal Management of …' *supra* at 17, 282.
[21] Article 38(1)(a)-(c), Rome Statute of the International Criminal Court of 17 July 1998 Amended on 29 November 2010.
[22] *ibid.*, article 38(1)(d).

The conventional sources of IHL of NIAC include CA3 to the GCs,[23] APII to the GCs[24] and the Hague Convention on Cultural Property[25] and its Second Protocol,[26] as well as several treaties on the methods of combat such as the Convention on the Prohibition of Biological Weapons,[27] the amended Convention prohibiting Certain Conventional Weapons[28] and its five protocols,[29] the Convention prohibiting Chemical Weapons,[30] the Anti-Personnel Mine Ban Convention,[31] as well as the Convention on Cluster Munitions.[32] Outside the realm of IHL, a series of other treaties are applicable to NIACs, including the Convention on the Rights of the Child[33] and its Optional Protocol on the Involvement of Children in Armed Conflict,[34] the Guiding Principles on Internal Displacement,[35] the Rome Statute,[36] among others. It is important to highlight that, as aptly put by Waschefort, due to the recent development of International Criminal Law (ICL) as an independent field, most of its

[23] Common Article 3 to the Geneva Conventions of 1949 (Common Article 3).
[24] Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II). Geneva, 8 June 1977.
[25] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954.
[26] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 26 March 1999.
[27] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. Opened for Signature at London of 10 April 1972.
[28] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. 10 October 1980 and its amendment of article 1, 21 December 2001.
[29] Protocol on Non-Detectable Fragments (Protocol I). 10 October 1980; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 CCW Convention as amended on 3 May 1996); Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III). 10 October 1980; Protocol on Blinding Laser Weapons (Protocol IV). 13 October 1995; and Protocol on Explosive Remnants of War (Protocol V). 28 November 2003.
[30] Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction. 13 January 1993.
[31] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. 18 September 1997.
[32] Convention on Cluster Munitions. 30 May 2008.
[33] Convention on the Rights of the Child. 2 September 1990.
[34] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. 25 May 2000.
[35] Guiding Principles on Internal Displacement of 22 July 1998.
[36] Rome Statute…, *supra* at 21.

evolution has been dependent on IHL.[37] For this specific reason, as well as the lack of space in the current thesis, ICL will be analysed concomitantly to IHL and other relevant areas of public international law.

*1.A.1. Customary law applicable to NIACs*

A greater number of customary provisions is applicable to NIAC. In assessing the relevant customary international law (CIL), the ICRC study,[38] which is considered, despite some significant reservations, [39] one of the most authoritative sources on the topic, determined that CIL regulating NIACs are nearly identical to the ones addressing IACs.[40] The study concluded that, out of 161 customary rules of IHL, 149 apply equally to both types of conflict.[41]

In addition to these rules, it is generally understood that the war crimes consigned in the Rome Statute possess customary status, as it was the intention of the drafters of the Statute to include only international crimes of such character.[42] In this fashion, the provisions found in article 8(2)(e), include a long list of crimes: directing attacks against the civilian population; civilian objects; persons and objects using protective emblems; humanitarian or peacekeeping personnel and objects; buildings dedicated

[37] Gus Waschefort, 'The Protection of Child Soldiers Against Intra-Party Violence during Armed Conflict: A Call for Reticence in the Development of IHL through the Jurisprudence and Practice of the ICC' *in* Martin Faix and Ondřej Svaček (eds.), *Development of IHL in the Jurisprudence and Practice of the ICC* (Palgrave forthcoming 2023/2024), 25-27.

[38] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules* and *Customary International Humanitarian Law – Volume II: Practice – Part 1,* and *Volume II: Practice – Part 2* (Cambridge University Press 2009). See also, the *International Committee of the Red Cross International Humanitarian Law Databases* <https://ihl-databases.icrc.org/en/customary-ihl> accessed 07 April 2023.

[39] For example, *vide* François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims* (ICRC 2003), 339; Jann Kleffner, 'Sources of the Law of Armed Conflict' *in* Rain Liivoja and Tim McCormack (eds), *Routledge Handbook on the Law of Armed Conflict*, 79-80; and more specifically Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press 2007).

[40] Jann Kleffner, 'Sources of the Law of Armed Conflict' *supra*, 79.

[41] Lindsay Moir, *The Law of Internal… supra* at 2, 51; Emily Crawford, 'Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts' (2007) 20(2) *Leiden Journal of International Law*, 456-457; and Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law – Volume I… supra* at 38.

[42] Eve La Haye, *War Crimes in Internal Armed Conflicts* (Cambridge University Press 2010), 104-122.

to religion and education, among others; historic monuments; and hospitals are considered customary prohibitions. The list goes on to add, pillaging; rape, sexual slavery and other forms of sexual violence; conscripting or enlisting children under the age of fifteen; forced displacement; killing or wounding treacherously combatants; declaring no quarter; mutilation; wanton destruction or the seizing of property; the use of poison and poisoned weapons, expanding bullets, as well as asphyxiating, poisonous or other gases are also considered prohibited by customary international law.[43]

The decision made by the Statue's drafters was the culmination of a process initiated by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadić* judgement.[44] In the Interlocutory Appeal on the Jurisdiction, the defence argued that there was no armed conflict taking place in the Prijedor region when the alleged crimes were committed. After arguing that, among others, article 3 of the ICTY was only applicable to IACs, and, the case brought against him related to a NIAC, the defence requested that these accusations be dropped.[45] Article 3 of the Statute of the ICTY addressed the violations of the laws and customs of war, and determined that the Tribunal had the power to prosecute individuals who violated this laws and customs, including the:

> *(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and*

[43] Rome Statute…, *supra* at 21.
[44] International Criminal Tribunal for the former Yugoslavia, ***Prosecutor v. Duško Tadić***, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995.
[45] *ibid.*, pars. 65-66.

> *education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property*.[46]

In response to such allegations, the Tribunal found that its jurisdiction to hear cases stemming from violations of article 3 was equally applicable in NIACs.[47] In a revolutionary decision, the Tribunal questioned the dichotomy between the two regimes of armed conflict, and asserted the gradual approximation between the two.[48] The ICTY's position was reiterated in other judgements, that not only developed the idea in the *Tadić* Motion for Interlocutory Appeal,[49] but also went on to declare that the provisions found in CA3 and APII reflected CIL.[50]

Furthermore, the *Tadić* case was crucial in consolidating the customary status of crimes against humanity, and the view that such crimes can be committed during NIACs, as well as independently from them.[51] The list of crimes against humanity contained in article 5 of the ICTY statute, which could be committed both during IACs and NIACS, included murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecution on political, racial and religious grounds; and other inhumane acts, directed against the civilian population.[52] In the Decision on the Defence for Interlocutory Appeal on Jurisdiction, the Tribunal, countered the defence's argument that crimes against humanity must necessarily bear a *nexus* to

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[46] Article 3, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993, SC res 827/1993.
[47] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *supra* at 44, par. 137.
[48] *ibid.*, par. 97.
[49] For example, International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Delacić* et al, Judgement, IT-96-21-A, 20 February 2001.
[50] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Halilović*, Judgement, IT-01-48-T, 16 November 2005; *Prosecutor v. Galić*, Judgement and Dissenting Opinion, IT-98-29-T, 5 December 2005 and *Prosecutor v. Hadžihasanović and Kubura*, Judgement, IT-01-47-T, 15 March 2006, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98*bis* Motions for Acquittal, 11 March 2005, and Decision on Motions for Acquittal Pursuant to Rule 98*bis* of the Rules of Procedure and Evidence, 27 September 2004, respectively.
[51] Lindsay Moir, *The Law of Internal… supra* at 2, 147-148.
[52] Article 5, Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* at 46.

IACs, the contrary being a violation of the principle of legality.[53] In response, the ICTY decided that, even though recognised by the Nuremberg Charter, the *nexus* between crimes against humanity and an IACs has all but been abandoned by as a matter of state practice.[54] Additionally, the court found that:

> *It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law.*[55]

This position, which not only reaffirms the customary status of crimes against humanity but also dissociates the commission of such crimes to a situation of armed conflict, was reiterated by other ICL tribunals, such as the International Criminal Tribunal for Rwanda (ICTR)[56] and the International Criminal Court (ICC).[57]

### *1.A.2. Other sources of law applicable to NIACs*

Along with the traditional sources of law, states and, particularly, NSAGs recognise the applicability of rules in a series of unconventional manners. Such agreements demonstrate the willingness to commit to international standards, which may or may not be considered applicable to those enacting them. The recognition of these rules is mainly undertaken via *ad-hoc* commitments. These can be roughly sub-divided into unilateral declarations; bilateral declarations between parties or a party and an outside actor (such as the UN, the ICRC or other non-governmental organisation);

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[53] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *supra* at 44, par. 139.
[54] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *supra* at 44, par.140.
[55] *ibid*., par. 141.
[56] For example, in International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu*, Judgement, ICTR-96-4-T, 2 September 1998, par. 565.
[57] Article 7, Rome Statute…, *supra* at 21.

tri-lateral agreements between both parties and a third actor; NSAGs' codes of conduct, instructions or regulations; and legislation, which can be enacted both by a state or a NSAG.[58] Even though such sources of law are not usually taken into account, due to the fact that more often than not they do not possess a counterpart in IHL, exceptions to this rule are not only significant, but also noteworthy.[59] Maybe the most prominent of these examples, the Bosnia and Herzegovina 22 May 1992 Agreement,[60] in which both sides agreed with the application of articles 51 and 52 of API regarding the regulation of the protection of civilians and civilian objects, was later used as a basis for prosecution in both *Blaškić*[61] and *Galić*[62] cases.[63]

Despite these exceptional situations, NSAGs' commitments and other expressions of *opinion iuris* and *praxis* have been mostly ignored in the development of customary law, due to the state-centred approach adopted by international law, which permeates the whole legal framework of NIACs. Such an approach is unhelpful in the sense that it denies the existence of a rich and complex set of norms that possess a singular potential to improve regulation and compliance with IHL, International Human Rights Law (IHRL) and other norms during a NIAC. It also encourages the creation and maintenance of prejudices that keep NSAGs at the

[58] For a more detailed view on these less traditional sources of law, see Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 107-152.
[59] Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 107.
[60] Bosnia and Herzegovina, Agreement No. 1 of May 22 1992 as replicated in Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law – Volume III: Cases and Documents* (ICRC 2011), 5.
[61] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Tihomir Blaškić*, Judgement, IT-95-14, 3 March 2000, pars. 172-174.
[62] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Galić*, Judgement and Dissenting Opinion, *supra* at 50, pars. 23-24.
[63] Luisa Vierucci, '"Special Agreements" between Conflicting Parties in the Case-law of the ICTY' *in* Bert Swart, Alexander Zahar and Göran Sluiter, *The Legacy of the International Criminal Tribunal for the former Yugoslavia* (Oxford University Press 2011).

margins of the law, incentivising non-compliance and ultimately leaving civilian population and fighters alike in an uncertain and vulnerable position.

### *1.B. Threshold of application of IHL of NIACs*

Until the 1949 Conventions, a pragmatic approach was adopted in order to classify a NIAC, the decision on the applicability of the law resting on the recognition of belligerency by external or parent states. The GCs came to change this system, determining the applicability of the appropriate set of norms to armed conflicts irrespective of external or internal recognition, terminology, or consent.[64] Notwithstanding this move to create objective criteria for the recognition of an armed conflict, in a compromise move in relation to the content of CA3, the delegates of the 1949 Diplomatic Conference decided not to adopt a definition for NIAC.

As a consequence, it was only with *Tadić* that a working definition was reached. In the Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, the court proposed that an armed conflict of non-international character exists *"whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State"*.[65] This interpretation breaks down the criteria for the existence of a NIAC to the existence of protracted armed violence, and a certain level of organisation by the part of the belligerents. This definition is considered authoritative, and as such, was adopted by several tribunals and other international actors.[66] This

[64] Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 155.
[65] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *supra* at 44, par. 70.
[66] For example, Special Court for Sierra Leone, *Prosecutor v. Sesay, Kallon and Gbao*, Judgement, SSL-04-15-T, 2 March 2009; International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo*, Decision of Confirmation of Charges, ICC-01/04-01/06, 29 January 2007; United Nations Security Council, *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011; and United Nations Human Rights Council, *Report of the International Commission of Inquiry to*

definition, though, establishes lowest threshold for the application of IHL to NIACs, as it adopts the definition of armed conflicts based on CA3. The difference between the threshold of applications in CA3 and APII will be discussed below.

*1.B.1. The Common Article 3 threshold*

As explained above, the approach adopted at the 1949 Diplomatic Conference was to leave the definition of NIACs open for future interpretation. This can be observed in the wording of the final document: *"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties* […]*"*.[67] The absence of a definition was finally overcome in the *Tadić* case, when the court decided that a NIAC exists *"whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State"*. [68]

The intensity criterion:

The first of the two criteria laid down by the *Tadić* definition, the existence of protracted armed violence, demands an examination of the violence employed, which should be more than sporadic or isolated.[69] The formula adopted in the case, *"whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state"*,[70] does not provide much help. Despite implying that the

*Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya*, A/HRC/17/44, 1 June 2011.

[67] Common Article 3.

[68] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *supra* at 44, par. 70.

[69] Caitlin Dwyer and Tim McCormack, 'Conflict Characterisation' *in* Rain Liivoja and Tim McCormack (eds.), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016), 58.

[70] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *supra* at 44, par. 70.

temporal scope, the term used by the court being *"protracted"*, is the determinative factor in the classification of the armed violence as an armed conflict.[71]

However, with subsequent ICTY decisions, as well as from other international tribunals, it became clear that duration is not the decisive element. When judging an interlocutory appeal in *Tadić*, the tribunal added, perhaps for further clarification, the expression *"large scale"* to this definition,[72] being "protracted" related to the magnitude of the violence, and an element of the intensity of the violence employed.[73] Additional elements found to determine the intensity criterion include the temporal scope and degree of violence;[74] the geographical scope of the conflict;[75] deaths and destruction resulting from the conflict;[76] the mobilisation of individuals

[71] Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 167.
[72] *'There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups* (…)*'.* International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *supra* at 44, par. 70. Additionally, in the appeals chamber judgement of Dario Kordić and Mario Čerkez, the court cites *'high-intensity combat operations'* (par. 335), a *'generalised state of armed conflict'* (par. 336), as well as destruction levels and the weapons used (par 340) as means to determine the existence of an armed conflict. International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Kordić and Čerkez*, Judgment (Appeals Chamber), IT-95-14/2, 17 December 2004.
[73] Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 167.
[74] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, Opinion and Judgement (Trial Chamber), IT-94-1-T, 7 May 1997, pars. 565-566; *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Ezad Landžo*, Judgement (Trial Chamber), IT-96-21-T, 16 November 1998, par. 189; *Prosecutor v. Slobodan Milošević*, Decision on Motion for Judgement of Acquittal, IT-02-54-T, 16 June 2004, par. 28; *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Judgement (Trial Chamber II), IT-03-66-T, 30 November 2005, pars. 135-167; *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgement (Trial Chamber), IT-04-84-T, 3 April 2008, par. 49; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment (Trial Chamber), IT-04-82-T, 10 July 2008, pars. 216-234, 243; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgement (Appeals Chamber), IT-04-82-A, 19 May 2010, par. 22; *Prosecutor v. Vlastimir Đorđević*, Judgement (Trial Chamber II), IT-05-87/1-T, 23 February 2011, pars. 1532-1536; International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo*, Decision of Confirmation of Charges, *supra* at 66, par. 235.
[75] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Slobodan Milošević*, Decision on Motion for Judgement of Acquittal, *ibid.*, par. 29; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment (Trial Chamber), *ibid*.; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgement (Appeals Chamber), *ibid*.; *Prosecutor v. Vlastimir Đorđević*, Judgement (Trial Chamber), *ibid.*
[76] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, Opinion and Judgement (Trial Chamber), *supra* at 74; *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Judgement (Trial Chamber II), *supra* at 74; *Prosecutor v. Vlastimir Đorđević*, Judgement (Trial Chamber), *supra* at 74; and International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo*, Decision of Confirmation of Charges, *supra* at 66.

and the distribution of weapons;[77] the weaponry used by the belligerents;[78] evidence of the conclusion of ceasefires or peace agreements;[79] the involvement of third parties, such as the UN or NATO;[80] the prosecution of crimes that are exclusive to situations of armed conflict;[81] the granting of amnesties;[82] as well as the use of armed forces instead of regular police[83] to neutralise NSAGs.[84]

It is important to highlight that all the elements listed above are mere indicia, and as such, the presence of one or a few of them is not enough to qualify decisively a situation of violence as an armed conflict. On the other hand, the absence of elements is also not in the detriment of the recognition of an armed conflict, particularly when examining a low-intensity conflict.[85] Bearing in mind the wide range of factors that play out in determining the existence of a NIAC, this list should not be

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[77] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Ezad Landžo*, Judgement (Trial Chamber), *supra* at 74, par. 188; *Prosecutor v. Slobodan Milošević*, Decision on Motion for Judgement of Acquittal, *supra* at 74, par. 30; *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Judgement (Trial Chamber II), *supra* at 74.

[78] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Slobodan Milošević*, Decision on Motion for Judgement of Acquittal, *supra* at 74, par. 31; *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Judgement (Trial Chamber II), *supra* at 74; *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgement (Trial Chamber), *supra* at 74; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment (Trial Chamber), *supra* at 74, pars. 213-222; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgement (Appeals Chamber), *supra* at 74.

[79] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment (Trial Chamber), *supra* at 74, pars. 232-234; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgement (Appeals Chamber), *supra* at 74.

[80] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, Opinion and Judgement (Trial Chamber), *supra* at 74, par. 567; *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Ezad Landžo*, Judgement (Trial Chamber), *supra* at 74, par. 190; *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgement (Trial Chamber), *supra* at 74; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment (Trial Chamber), *supra* at 74, pars. 220-224; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgement (Appeals Chamber), *supra* at 74; International Criminal Court*, Prosecutor v. Thomas Lubanga Dyilo*, Decision of Confirmation of Charges, *supra* at 66, par. 235.

[81] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment (Trial Chamber), *supra* at 74, pars. 243, 247; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgement (Appeals Chamber), *supra* at 74.

[82] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment (Trial Chamber), *ibid.*; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgement (Appeals Chamber), *ibid*.

[83] *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment (Trial Chamber), *supra* at 74, pars. 243, 245-246; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgement (Appeals Chamber), supra at 74.

[84] Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 168-169.

[85] *ibid.*, 168.

seen as exhaustive, since other elements may play a role in the determining the intensity threshold,[86] but rather as a mere set of indicators presented to assist the analysis in a case-by-case basis.[87]

Revisiting the element of the duration of violence, despite standing among several other factors, this indicium ought not be overlooked. This concern was voiced in a few occasions,[88] and the importance of the temporal scope was reaffirmed in the *Boškoski* case at the ICTY.[89] The temporal element can be a significant factor in determining the existence of an armed conflict. Violence of short duration may amount to an armed conflict in a high-intensity scenario where other factors are significantly present, while in the same manner a low-intensity situation may be considered an armed conflict if extended for a longer period of time.[90]

Perhaps the prime example of the relevance of the temporal element, the *La Tablada* case at the Inter-American Commission of Human Rights has been widely

[86] For example, territorial control and responsible command; two elements usually considered to be determinant in evidence the organisational aspect of non-state armed groups, has been considered to be factors determining the intensity of violence. Lindsay Moir, 'The Concept of Non-International Armed Conflict' *in* Andrew Clapham, Paola Gaeta and Marco Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015), 413. See also, Anthony Cullen, *The Concept of Non-International… supra* at 2, 153-154; International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgement (Trial Chamber), *supra* at 74.

[87] Lindsay Moir, 'The Concept of Non-International…' *ibid*.

[88] See for instance, International Committee of the Red Cross, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May – 12 June 1971) – Report on the Work of the Conference* (ICRC August 1971), 39, par. 164; International Law Association, *The Hague Conference (2010): Use of Force – Final Report on the Meaning of Armed Conflict in International Law*, 30.

[89] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment (Trial Chamber), *supra* at 74, pars. 175, 245-246; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgement (Appeals Chamber), *supra* at 74, par. 21.

[90] Considering the exiguous word-limit, a more in-depth discussion on the topic beyond the scope of this thesis. A detailed discussion of the intensity criterion was carried out by Martha M. Bradley, 'Revisiting the notion of "intensity": inherent in Common Article 3: An examination of the minimum threshold which satisfies the notion of "intensity" and a discussion of the possibility of applying a method of cumulative assessment' (2017) 17(2) *International Comparative Law Review.* See also, in the context of Somalia, Robin Geiβ, 'Armed Violence: Low-intensity conflicts, spillover conflicts, and sporadic law enforcement operations by third parties' (2009) 91(873) *International Review of the Red Cross*.

studied,[91] due to its contribution in the determination of the lower threshold of application of IHL of NIACs. The case in question concerned an attack conducted by members of the *Todos por la Patria* guerrilla group, in an attempt to prevent a suspected *coup d'etat* against the first democratically elected government in Argentina, after seven years of military dictatorship in that country. The barracks were taken by the NSAG, only to be retaken 30 hours later by the Argentine armed forces, resulting in the death of 29 of the 42 guerrilla fighters.[92] Despite the brief period of time, spanning from the 23 to the 24 January 1989, the Commission found that the remaining material conditions of the case were elements that strongly demonstrated the protracted nature of the violence that unfolded.[93]

The organisation criterion:

The second criterion arising from *Tadić*, the presence of an "organised armed group", was, once again, not very well defined, and open to interpretation when first mentioned. The need for the parties to the conflict to be organised is uncontroversial. The general consensus favours the idea that, while states' armed forces would presumably fulfil this criterion, save for cases such as of state disintegration, it is necessary to evaluate the level of organisation possessed by the NSAGs involved in the conflict.[94] It is understood that, in its minimal dimension, the level of organisation expected to reach this threshold should be enough to allow these groups to carry out

[91] For example, Anthony Cullen, *The Concept of Non-International… supra* at 2, 143-146; Dapo Akande, 'Classification of Armed Conflicts…' *supra* at 17, 53-54; Michael Schmitt, 'Iraq (2003 onwards)' *in* Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts*, 371, fn 71; Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 169-170; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford University Press 2011), 105-107.
[92] Inter-American Commission Human Rights, *Juan Carlos Abella v. Argentina (La Tablada)*, case no. 11.13718, report no. 55/97, OEA/Ser.L/V/II.95 Doc. 7 rev. at 271, 18 November 1997, pars. 1-2, 7-10.
[93] *ibid.*, par. 155.
[94] Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 170.

the obligations imposed in CA3.[95] This approach was confirmed in the ICTY with further decisions, regarding the Kosovo Liberation Front (KLA), but the precise level of the organisation required by CA3 has varied between tribunals, but it was always seen to be an inherently low threshold.[96]

As with the intensity criterion, organisation must be assessed in case-by-case basis, with certain indicia pointing out for the fulfilment of said threshold. The absence of certain elements does not imply lack of organisation the same way the presence of several indicators does not presume a minimum degree of organisation. These indicia were divided into groups in the ***Boškoski***[97] and ***Đorđević***[98] being roughly qualified as those signalling the presence of a command structure, those that demonstrate that the NSAG could carry out operations in an organised manner, those that indicate logistical capabilities, those suggesting the capacity to enforce discipline and to comply with the basic obligations contained in CA3, and those indicating the organisation's capacity to speak with one voice.[99]

The elements identified by the ICTY as indicia of a minimum level of organisation for the characterisation of a NIAC include the existence of an official command structure,[100] the existence of a headquarters,[101] the use of uniforms by members of

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[95] Lindsay Moir, 'The Concept of Non-International…' *supra* at 86, 405.
[96] For example, see the different wording between the International Criminal Tribunal for Rwanda in *Prosecutor v. Jean-Paul Akayesu*, Judgement, *supra* at 56, par. 620 (*"The term, armed conflict' in itself suggests the existence of hostilities between armed forces organized to a greater or lesser extent"*) and the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Judgement (Trial Chamber II), *supra* at 74; par. 89 (*"Therefore, some degree of organisation by the parties will suffice to establish the existence of an armed conflict"*).
[97] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment (Trial Chamber), *supra* at 74, pars. 199-203.
[98] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Vlastimir Đorđević*, Judgement (Trial Chamber), *supra* at 74, pars. 1537-1578.
[99] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment (Trial Chamber), *supra* at 74, pars. 199-203.
[100] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Slobodan Milošević*, Decision on Motion for Judgement of Acquittal, *supra* at 74, par. 23; *Prosecutor v. Fatmir Limaj,*

the NSAG,[102] the presence of specialised roles and organs within the NSAG's organisational structure,[103] the means of communication employed,[104] the military training of its members,[105] the establishment of relations with external actors,[106] the control of territory,[107] the establishment of checkpoint in said territory,[108] the capacity to establish designated zones of operation,[109] the ability to procure, transport and distribute weaponry,[110] the organisation's recruiting capabilities,[111] the capacity to

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*Haradin Bala and Isak Musliu*, Judgement (Trial Chamber II), *supra* at 74; par. 110; *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgement (Trial Chamber), *supra* at 74, pars. 65-68; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment (Trial Chamber), *supra* at 74, par. 271; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgement (Appeals Chamber), *supra* at 74, par. 23; *Prosecutor v. Vlastimir Đorđević*, Judgement (Trial Chamber), *supra* at 74, pars. 1541-1543.

[101] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Slobodan Milošević*, Decision on Motion for Judgement of Acquittal, *supra* at 74, par. 23; *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgement (Trial Chamber), *supra* at 74, pars. 65-68.

[102] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Judgement (Trial Chamber II), *supra* at 74, par. 123; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment (Trial Chamber), *supra* at 74, par. 285; *Prosecutor v. Vlastimir Đorđević*, IT-05-87/1-T, Judgement (Trial Chamber II), *supra* at 74, pars. 1562-1563.

[103] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Judgement (Trial Chamber II), *supra* at 74, pars. 100-101.

[104] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Judgement (Trial Chamber II), *supra* at 74, pars. 100-103; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment (Trial Chamber), *supra* at 74, par. 269; *Prosecutor v. Vlastimir Đorđević*, Judgement (Trial Chamber), *supra* at 74, pars. 1569-1570.

[105] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgement (Trial Chamber), *supra* at 74, pars. 60, 86; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment (Trial Chamber), *supra* at 74, par. 284; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgement (Appeals Chamber), *supra* at 74, par. 23; *Prosecutor v. Vlastimir Đorđević*, Judgement (Trial Chamber), *supra* at 74, pars. 1560-1561.

[106] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Judgement (Trial Chamber II), *supra* at 74, pars. 125-129; *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgement (Trial Chamber), *supra* at 74, par. 60; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment (Trial Chamber), *supra* at 74, par. 289; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgement (Appeals Chamber), *supra* at 74, par. 23; *Prosecutor v. Vlastimir Đorđević*, Judgement (Trial Chamber), *supra* at 74, par. 1576.

[107] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgement (Trial Chamber), *supra* at 74, pars. 60, 70-75; *Prosecutor v. Vlastimir Đorđević*, Judgement (Trial Chamber), *supra* at 74, par. 1557.

[108] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Judgement (Trial Chamber II), *supra* at 74; par. 145; *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgement (Trial Chamber), *supra* at 74, pars. 71-72.

[109] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Slobodan Milošević*, Decision on Motion for Judgement of Acquittal, *supra* at 74, par. 23; *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Judgement (Trial Chamber II), *supra* at 74; par. 95.

[110] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Slobodan Milošević*, Decision on Motion for Judgement of Acquittal, *supra* at 74, par. 23; *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgement (Trial Chamber), *supra* at 74, pars. 60, 76-82; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment (Trial Chamber), *supra* at 74, pars. 281, 286;

coordinate operations,[112] the existence of internal regulations[113] and disciplinary procedures,[114] among others.[115]

The approach adopted by the tribunal was reiterated, in a more succinct and polished version, by the ICC in the *Lubanga* case,[116] which reinforced the necessity of a flexible approach to the interpretation of the organisation indicia.

The notion of NSAG organisation is directly linked with the existence of responsible command. Despite not being presented in the wording of CA3 or in the *Tadić* definition, the necessity of a responsible command as an indispensable requirement for an NSAG's organisation enjoys both academic and jurisprudential support. Commenting on the content of CA3, Jean Pictet, explained the conditions that could be used to identify an armed conflict, proposing that the group opposing the government should possess *"*[…]*an organized military force, an authority responsible for its acts* […]*"*.[117] This notion was followed consistently in international tribunals. In

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*Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgement (Appeals Chamber), *supra* at 74, par. 23; *Prosecutor v. Vlastimir Đorđević*, Judgement (Trial Chamber), *supra* at 74, pars. 1566-1568.

[111] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Judgement (Trial Chamber II), *supra* at 74, par. 118; *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgement (Trial Chamber), *supra* at 74, par. 60.

[112] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Judgement (Trial Chamber II), *supra* at 74, par. 108; *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgement (Trial Chamber), *supra* at 74, par. 60.

[113] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Judgement (Trial Chamber II), *supra* at 74, par. 110; *Prosecutor v. Vlastimir Đorđević*, Judgement (Trial Chamber), *supra* at 74, pars. 1571-1572.

[114] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Judgement (Trial Chamber II), *supra* at 74, pars. 113-117; *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgement (Trial Chamber), *supra* at 74, pars. 60; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment (Trial Chamber), *supra* at 74, pars. 274-275; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgement (Appeals Chamber), *supra* at 74, par. 23; *Prosecutor v. Vlastimir Đorđević*, Judgement (Trial Chamber), *supra* at 74, pars. 1573-1575. See also, in relation to the existence of disciplinary procedures, International Criminal Court, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, ICC-001/04-01/07, 30 September 2008, par. 239.

[115] Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 170-171.

[116] International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo*, Judgement (Trial Chamber I), ICC-01/04-01/06, 14 March 2012, par. 537.

[117] Jean Pictet (ed), *The Geneva Conventions of 12 August 1949 – Commentary – vol. IV* (ICRC 1958), 35.

the *Hadžihasanović* case, the ICTY concluded that *"[…] [i]t is evident that there cannot be an organized military force save on the basis of responsible command […]* [t]*he relevant aspects of international law unquestionably regard a military force engaged in an internal armed conflict as organized and therefore as being under responsible command* […]*"*.[118] Similarly, the ICTR,[119] the Special Courts for Sierra Leone[120] and the ICC[121] decided that the relationship between a responsible command and the organisation of an NSAG is inextricable.

This relation, though, could be understood as an additional requisite for the recognition of a situation of armed conflict, as it is in the case of the APII threshold. It seems that the best position is the one that views responsible command as a mere aspect of the command structure element. The equalisation of the CA3 threshold to its APII counterpart would ultimately frustrate the objective of setting lower and higher thresholds for a NIAC, with different conditions and rules.[122]

*1.B.2. A second threshold: APII*

In an attempt to clarify the concepts created by CA3, two APs to the GCs were adopted. As it was discussed above, while API covered armed conflicts that were essentially international in nature, APII expanded the minimum humanitarian provisions found in CA3. The latter Protocol addressed in detail topic such as

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[118] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Hadžihasanović and Kubura*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, IT-01-47-AR72, 16 July 2003, pars. 16-17.

[119] *Vide* International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu*, Judgement, *supra* at 56, par. 626.

[120] Special Court for Sierra Leone, *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Judgement (Trial Chamber I), SCSL-2004-14-T, 2 August 2007, par. 127.

[121] International Criminal Court, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, *supra* at 114; *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 1(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *supra* at 51, par. 234.

[122] Anthony Cullen, *The Concept of Non-International… supra* at 2, 149-157; Lindsay Moir, 'The Concept of Non-International…', *supra* at 86, 407-408. Additionally, see Jean Pictet (ed), *The Geneva Conventions… vol. IV supra* at 117, 35 (*'Nevertheless, these different conditions, although in no way obligatory, constitute convenient criteria* […]').

humane treatment, individuals *hors de combat* and the protection of the civilian population. However, this increased level of protection brought by APII was criticised for being too rudimentary. According to some commentators, most of its provisions were already part of CIL, being applicable regardless of ratification, with the remaining provisions coming close to total inapplicability due to the very high threshold necessary for their application.[123]

Article 1 of the Protocol determines its scope of material application

> *1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.*
>
> *2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.*[124]

As can be seen from the article's wording, one of the biggest differences between the lower threshold of CA3 and the higher threshold found in APII is the requirement from the latter that an armed conflict be fought between a state's armed forces and a NSAG. This decision is seen by great part of the scholarship as a major flaw of the Protocol. It leaves scenarios under the lower level of protection of the CA3 provision, even if the NSAGs involved possess a level of organisation that equates, or even

[123] Dieter Fleck, 'The Law of Non-International Armed Conflicts' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (4th edn, Oxford University Press 2021), 651-652. For a different view on the customary status of the provision of Additional Protocol II, see Lindsay Moir, *The Law of Internal… supra* at 2, 103-105; and Eve La Haye, *War Crimes in Internal… supra* at 42.
[124] Article 1, Additional Protocol II.

sometimes surpasses the state government's capabilities,[125] like in the civils wars in Angola, Somalia, Lebanon, and Liberia.[126]

Another additional requirement found in APII is the increased degree of organisation required on the part of NSAGs, in contrast with the one demanded of such groups by CA3. As examined above, the CA3 threshold is considerably lower, ranging from "*organized to a greater or lesser extent"*[127] to "*some degree of organisation by the parties will suffice to establish the existence of an armed conflict."*[128] The nexus between organisation and responsible command, which is considered to be an indicium of organisation under CA3, under APII becomes a requirement.

A third additional requirement, the exercise of territorial control, is the subject of considerable debate. The traditional view proposes that a significant portion of the territory should be controlled by a NSAG to see the application of the Protocol.[129] A second view suggests that, rather than a matter of quantity, the relevant aspect to be taken into consideration is the quality of the territorial control.[130] The former position seems to be more coherent, under a teleological approach of the article. The wording of the provision makes it clear that territorial control is necessary in order to *"enable them* [the armed groups] *to carry out sustained and concerted military operations and to implement this Protocol"*. Consequently, a reduced portion of

[125] See for example, Christopher Greenwood, 'International Humanitarian Law and the Tadic Case' (1996) 7(2) *European Journal of International Law*; Lindsay Moir, *The Law of Internal… supra* at 2, 103-105; Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 184.
[126] Hillaire McCoubrey and Nigel White, *International Organizations and Civil Wars* (Aldershot 1995), 67.
[127] International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu*, Judgement, *supra* at 56, par. 620.
[128] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Judgement (Trial Chamber II), supra at 74; par. 89.
[129] As the conclusion reached by the International Law Association Committee seems to imply. International Law Association, *The Hague Conference (2010)… supra* at 88.
[130] See for instance, Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 185-186; Lindsay Moir, *The Law of Internal… supra* at 2, 105-106.

territory, in which an NSAG is capable of carrying sustained and concerted operations and implementing humanitarian provisions, is preferable to a big portion of territory that is precariously controlled.[131] For the purposes of APII, territorial control is a means to an end.

The fourth and fifth additional requirements, the carrying out of sustained and concerted military operations, and the implementation of APII, are a consequence of the territorial control requirement. The necessity of sustained and concerted military operations has been interpreted in two different forms. One view, eminently supported by decisions of the ICC,[132] proposes that the abovementioned requirement is not a higher level of violence, in comparison to the CA3 threshold. The term "sustained" adopted by the Protocol would instead measure duration. A sustained military operation being an operation that was executed without intermissions, continuously. If compared with the lower threshold of NIAC, the requirement of sustained and concerted military operations would be exactly the same as the requirement of protracted armed violence of CA3.[133]

A Second interpretation indicates that the meaning of sustained and concerted operations is actually an escalation in the level of intensity of the conflict, which would rule out most low-intensity situations, such as the ones contemplated by CA3.[134] It is important to highlight that for some commentators,[135] the two thresholds

[131] This exact interpretation was adopted by the International Criminal Tribunal for Rwanda in *Prosecutor v. Jean-Paul Akayesu*, Judgement, supra at 56, par 626: '[…] *these armed forces must be able to dominate a sufficient part of the territory so as to maintain sustained and concerted military operations and to apply Additional Protocol II'.*

[132] *Vide* International Criminal Court, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, supra at 114, par. 239 and *Prosecutor v. Omar Hassan Ahmad Al Bashir ('Omar Al Bashir')*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, 4 March 2009, par. 59.

[133] Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 188.

[134] Anthony Cullen, *The Concept of Non-International… supra* at 2, 104-105.

relate to both duration and intensity, with the APII threshold being an escalation in the levels of both elements in relation to the lower threshold of NIAC. This position received support from the ICTY in the *Boškoski* case, when the term "protracted violence" was considered to be a lower representation of intensity than "sustained and concerted military operations".[136] The intention demonstrated by the states' representatives at the 1974-1979 Conference was to expand the set of rules applicable to NIACs, in exchange for a narrower scope of application. Therefore, it seems counterintuitive to suggest that, instead of a higher threshold of violence, the expression used in the Protocol indicates the same level of intensity as the one in CA3.

An added issue with this additional requirement is the lack of clarity on whether the NSAG engaged in hostilities should be capable of carrying out sustained and organised military operations, or if there is a need for the group to actually carry out said operations.[137] It could be argued that, the wording of the article: *"as to enable them to carry out sustained and concerted military operations"* refers to capacity, rather than actual action, as the term "enable" seems to imply a hypothetical opportunity do so. Nevertheless, for reasons of coherence, it is difficult to see how the mere capacity to carry out sustained and concerted military operations can, in fact, demonstrate a level of violence superior to that of protracted armed violence.

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[135] Lindsay Moir, *The Law of Internal… supra* at 2, 106-107.
[136] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment (Trial Chamber), supra at 74, par. 197. For a comprehensive explanation on the scope of the requirement for territorial control in Additional Protocol II conflicts, see Martha M. Bradley, 'Revisiting the scope of application of Additional Protocol II: Exploring the inherent minimum threshold requirements' (2019) 82 *African Yearbook of International Humanitarian Law*, 102-111, and 'Additional Protocol II: Elevating the minimum threshold of intensity?' (2020) 102(915) *International Review of the Red Cross*, 1138-1150.
[137] Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 188.

There could only be an increased level of intensity if this capacity was to be put into practice.

Similarly, the last additional requirement, the implementation of the Protocol raises the same question of capacity *versus* practice. In a different manner than the previous condition, the actual capacity to implement the Protocol should be enough for the fulfilment of this requirement. Demanding the actual implementation of the Protocol in order for it to be applied would be to give a free pass to NSAGs to submit to the obligations of APII only when convenient.[138]

*1.B.3. Article 8 (2)(f) of the Rome Statute: a third threshold?*

With the adoption of the Rome Statute of the ICC,[139] the scope of application the law of NIACs gained an additional layer of complexity. When defining war crimes in NIAC the Statute's drafters have, apparently, set a third threshold of application for such conflicts, by stating in article 8 (2)(f) that: "*Paragraph 2 (e) […] applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups".*[140] The referred article 8(2)(e) determines that other serious violations of the laws and customs applicable to NIACs are to be considered war crimes.

While at first glance it seems that the Rome Statute did, indeed, establish a new, intermediary, threshold of application of IHL of NIACs, as defended by influent commentators,[141] as well as part of the ICC,[142] a more detailed analysis of the article

[138] *ibid.*, 188-189. For a more detailed exploration on the responsible command requirement in Additional Protocol II, see Martha M. Bradley, 'Revisiting the scope…' *supra* at 136, 92-102.
[139] Rome Statute…, *supra* at 21.
[140] *Ibid.*, Article 8(2)(f).
[141] Prominently Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law – Volume I: Outline of International Humanitarian Law* (ICRC 2011), Part I, Chapter 2 –

and the Statute's drafting history indicates otherwise. In clarifying the threshold of application in article 8(2)(f), Sandesh Sivakumaran posited the argument that, instead of intending to create a third framework for NIACs, the drafters of the Rome Statute simply made a bad choice of words, when trying to transpose the *Tadić* definition into the new treaty.[143]

According to Sivakumaran, a historical look at the Rome Statute's Diplomatic Conference shows that the initial approach that was suggested to address war crimes in NIACs was to group all these crimes in a single article. Since many states did not agree with this format, the Conference Bureau proposed a change that would divide the crimes into two groups. The first one addressing CA3 violations, while the other the remaining ones, the latter being subjected to a higher threshold, similar to the one contained in APII. The result of this proposed arrangement was a sharp divide between states. Some found this new threshold too restrictive, particularly because it excluded armed conflicts fought between NSAGs, while others found the new structure acceptable. In an attempt to bridge this divide, the Sierra Leone delegation proposed a compromising construction, changing the *chapeau* of the then-article 5 quarter (D), to include that the article would be applicable to *"armed conflicts that take place in a territory of a State when there is a protracted armed*

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International Humanitarian Law as a Branch of Public International Law, 23; and René Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press 2002), 268-269.

[142] For example, International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo*, Decision of Confirmation of Charges, *supra* at 66, par. 234; *Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir")*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *supra* at 132, par. 60; *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 1(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *supra* at 121, par. 233.

[143] Similarly, see Anthony Cullen, 'Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)' (2007) 12(3) *Journal of Conflict and Security Law*; Claus Kreß, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' (2000) 30 *Israel Yearbook on Human Rights*; and Dapo Akande, 'Classification of Armed Conflicts' *supra* at 17, 56.

*conflict between the governmental authorities and organised armed groups or between such groups".*[144] This proposal was well-accepted and eventually incorporated to the document.[145]

A comparison between both documents – the *Tadić* interlocutory appeal on jurisdiction decision[146] and Sierra Leone's proposal – shows that, with the exception of the expression *"protracted armed conflict"*, the Sierra Leonean proposal reproduces exactly the definition of armed conflict in *Tadić*, relating to the application of CA3.[147] In addition to that, the expression *"protracted armed conflict"* could be considered redundant in itself, since the element of protraction is already a constitutive characteristic of NIACs, together with the organisation of the parties.[148] The argument of the intermediary approach sounds considerably less convincing if considering that this new threshold would require the elements of organisation of the belligerents, as well as a situation of *"protracted protracted armed violence."*[149]

### *1.C. The geographical scope of NIACs*

It can be concluded from the examination of CA3 and the decision on the Appeal on Jurisdiction of the *Tadić* case that, in contrast to the provision found in CA2 of the

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[144] From the Spanish version of the document: *'Sustitúyase esa frase por lo siguiente:*
*"Se aplica a los conflictos armados que tienen lugar en el territorio de un Estado cuando existe un conflicto armado prolongado entre las autoridades gubernamentales y grupos armados organizados o entre tales grupos."'* Comisión Plenaria de la Conferencia Diplomática de Plenipotenciarios de las Naciones Unidas sobre el estabelecimiento de una corte penal internacional, *Propuesta Presentada por Sierra Leona*, A/CONF.183/C.1/L.59, 13 July 1998.
[145] Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 192-193.
[146] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *supra* at 44, par. 70.
[147] Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 193.
[148] Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press 2003), 441.
[149] Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 193. For an in-depth commentary, see Martha M. Bradley, '"Protracted armed conflict": A conundrum. Does article 8(2)(f) of the Rome Statute require an organised armed group to meet the organisational criteria of Additional Protocol II?' (2019) 32(3) *South African Journal of Criminal Justice*; and Sandesh Sivakumaran, 'Identifying an Armed Conflict Not of an International Character' *in* Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009).

GCs,[150] the conflicts regulated by CA3 are exclusively of a non-international character. Considering that armed conflicts can be only of international or non-international nature, it is amply understood that, in situations involving multiple armed conflicts, instead of applying generally one of the two regimes, or even a combination of both, the different conflicts coexist, with their character varying in relation to the nature of the actors involved.[151]

In fact, conflicts may occur between states, which would make them IACs, and between states and NSAGs, being NIACs. In addition to this division, a third kind of conflicts – also of a non-international character – is possible under CA3. Conflicts fought between NSAGs, inside a High Contracting Party's territory. While this point is not universally accepted, with some commentators suggesting that states are necessary in order for the situation to be characterised as an armed conflict,[152] the general position is that there is no such requirement in the wording of CA3.[153]

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[150] *'In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.*
*The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.*
*Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof'*. Common Article 2 to the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva of 12 August 1949, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva of 12 August 1949, Convention (III) relative to the Treatment of Prisoners of War. Geneva of 12 August 1949 and Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva of 12 August 1949.

[151] Lindsay Moir, 'The Concept of Non-International…' *supra* at 86, 396-397; Caitlin Dwyer and Tim McCormack, 'Conflict Characterisation' *supra* at 69, 66-68.

[152] For example, see International Committee of the Red Cross, *Armed Conflicts linked to the Disintegration of State Structures, Preparatory Document Drafted by the ICRC for the First Periodical Meeting on International Humanitarian Law (Geneva, 19-23 January 1998)*; and Anthony Cullen, *The Concept of Non-International… supra* at 2, 146.

[153] Lindsay Moir, 'The Concept of Non-International…' *supra* at 86, 396-397; Jann Kleffner, 'Scope of Application of Humanitarian Law' *in* Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (4th Ed Oxford University Press 2021), 57; Caitlin Dwyer and Tim McCormack, 'Conflict Characterisation' *supra* at 69, 67-68; Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 164; Dapo Akande, 'Classification of Armed Conflicts…' *supra* at 17, 51.

The first time the concept of concurrent armed conflicts was recognised was in the *Nicaragua* case at the ICJ. This was the case when the Court found that the conflict between the Nicaraguan Government and the *Contras* was a NIAC, whereas the one fought between the Nicaraguan and the United States' governments was an IAC.[154] The ICJ's position was reiterated numerous times by different international tribunals,[155] as well as espoused by the ICC. For instance, in the *Lubanga* case, the Court pointed out that *"[i]n situations where conflicts of a different nature take place on a single territory, it is necessary to consider whether the criminal acts under consideration were committed as part of an international or a non-international conflict […]"*.[156]

It has been suggested that in these cases, despite the armed conflict being of a non-international character, the state would not be excused from all its obligations not related to IHL of NIAC.[157] Despite the legitimate reason behind its initial premise, the need to increase the level of protection of civilian populations, the conclusion inferred from this position paradoxical. In these cases, civilians located in a region affected by a NIAC would receive additional protection due to the existence of a concurrent IAC in comparison to those affected only by the NIAC. Instead of proposing a system that would reinforce the divide between legal frameworks, it is important to develop alternatives to provide equal protection under the different regimes of the IHL.

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[154] International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgement of 27 June 1986, par. 219.
[155] See for instance, International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo*, Judgement (Trial Chamber I), *supra* at 116, par. 540. International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, Judgement (Appeals Chamber), IT-94-1-A, 15 July 1999, par. 84; *Prosecutor v. Vlastimir Đorđević*, Judgement (Trial Chamber II), *supra* at 74, pars. 1579-1580. Special Court for Sierra Leone, *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Nature of the Armed Conflict (Appeals Chamber), SCSL-2004-14-AR72(E), 25 May 2004, par. 27.
[156] International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo*, Judgement (Trial Chamber I), supra at 116, par. 550.
[157] Caitlin Dwyer and Tim McCormack, 'Conflict Characterisation' *supra* at 69, 68.

Another point of note is the characterisation of armed conflicts in occupied territory. The wording of CA2 seems to indicate that all kinds of armed resistance met by the occupying power that qualifies as an armed conflict would be of an international nature.[158] This certainty has been recently questioned during an expert meeting organised by the ICRC regarding the law of occupation.[159] A group of experts pointed out that, usually, hostilities and other acts of violence aimed towards the occupying forces are carried out by NSAGs, meaning that these attacks cannot be attributed to the occupied state.[160] It has been suggested that such is the situation in the Palestinian Occupied Territory, between Hamas and Fatah (and later the Palestinian Authority), and it was in the case of the Bosnian War, between Bosnian Muslims and Croats.[161] In these cases, a conflict between NSAGs would exist inside an occupied territory, without the latter's participation.

Still, in the case the conflict involves the occupying power and a NSAG, the presumption of the existence of an IAC is not absolute. Despite the majoritarian view that, due to the wording of CA2, armed conflicts between occupying powers and organised NSAGs belonging to the occupied state are always international,[162] Lindsay Moir advances the argument that overall control[163] cannot be presumed, and in practice is hard to be established. Consequently, these armed conflicts could not

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[158] '[t]*he Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance'*, Common Article 2 to the Geneva Conventions of 1949.

[159] International Committee of the Red Cross, *Expert Meeting – Occupation and Other Forms of Administration of Foreign Territory* (ICRC March 2012), 124.

[160] *ibid.*

[161] Andreas Paulus and Mindia Vashakmadze, 'Assymetrical war and the notion of armed conflict – a tentative conceptualization' (March 2009) 91 (873) *International Review of the Red Cross*, 115; and Lindsay Moir, 'The Concept of Non-International…' *supra* at 86, 397.

[162] Andreas Paulus and Mindia Vashakmadze, "Assymetrical war and the notion of armed conflict – a tentative conceptualization", *ibid*; Antonio Cassese, *International Law* (2nd edn Oxford University Press 2005), 420; International Committee of the Red Cross, *Expert Meeting – Occupation… supra* at 159.

[163] As determined by the International Criminal Tribunal for the former Yugoslavia, which would internationalise an armed conflict. This topic will be discussed below.

be characterised as international.[164] This point of view is supported by the *Lubanga* case, in which the court, not finding evidence of overall control over the UPC/FPLC, concluded that these conflicts, with NSAGs supported by the Democratic Republic of Congo were non-international in nature, regardless of the occupation of Bunia by Uganda.[165] Moir's proposition, despite being the minority position, seems to be the most appropriate, as it is grounded on the nature of the parties, avoiding a general equation of NSAGs' actions to those of states, and at the same time recognising the asymmetrical capabilities of the parties in complying with IHL.

### *1.D. The temporal scope of NIACs*

Finally, it is necessary to establish the temporal scope of IHL of NIACs. The definition of both initial and final temporal boundaries is unclear, as CA3 is absolutely silent on the matter, while article 2(2) of APII sets a rather generic delimitation of the end of IACs.[166]

Regarding the beginning of applicability of IHL of NIAC, it is accepted that it starts after a gradual escalation of violence and organisational capability, coinciding with the lowest threshold of CA3. Nevertheless, a few notable exceptions can be identified.[167] In the *Tablada* case, the Inter-American Commission of Human Rights identified the starting point of the 30-hour NIAC as the moment in which the members of the *Todos por la Patria* launched their attack against the military base. The attack , as pointed out by the Commission, was carefully planned, coordinated,

[164] Lindsay Moir, 'The Concept of Non-International…' *supra* at 86, 398.
[165] International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo*, Judgement (Trial Chamber I), *supra* at 116, pars. 561-567.
[166] Marco Milanovic, 'The end of application of international humanitarian law' (2014) 96(893) *International Review of the Red Cross*, 178-179.
[167] Gabriella Venturini, 'The Temporal Scope of Application of the Conventions' *in* Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015), 59.

and executed.[168] The differing factors that lead to such a decision, were the high level of organisation, that already pre-existed this confrontation, as well as its chosen object, the prompt reaction of the government, as well as the destructive level of violence exercised by the NSAG.

Exceptions aside, reaching the threshold of a NIAC happens progressively, until the violence's intensity becomes protracted, and subsequently sustained. As pointed out above, a protracted conflict denotes a lower level of violence than a sustained conflict, even though the meaning of both terms seems to equate intensity with duration. The same can be said about the organisational capacity of NSAGs. The gathering of resources and manpower, later translated into training and territorial control, usually happens gradually. A very practical problem in relation to this dynamic is that the character of the conflict may not be clear for the forces on the ground. While it is a complex, yet achievable, task to classify a situation as a NIAC *ex post facto* in a court, this assessment may be impossible to be done in real-time.[169]

There is little improvement when identifying the end of application of IHL in NIACs. Once again, in opposition to IACs, that are considered to end when there is a somewhat permanent halt in hostilities, this appraisal is much more subjective in NIACs.[170] Article 2(2) of APII is the only guidance provided in the GCs and their Protocols. It states that the Protocol is to be applied until the *"end of the armed*

[168] Inter-American Commission Human Rights, *Juan Carlos Abella v. Argentina* (La Tablada), *supra* at 92, pars. 154-156. Additionally, see Anthony Cullen, *The Concept of Non-International… supra* at 2, 144-146.
[169] Gabriella Venturini, 'The Temporal Scope…' *supra* at 167, 60; Andrew J. Carswell, 'Classifying the conflict: a soldier's dilemma' (2009) 91(873) *International Review of the Red Cross,* 150-152.
[170] Marco Milanovic, 'The end of application…', *supra* at 166, 179.

*conflict"*[171], which indicates objectively that the rules for higher threshold NIACs cease to apply when the conflict reaches an end. Exceptionally, its application does not cease in cases of individuals still affected by the conflict due to detention after its termination. Despite raising the issue of whether IHL is capable of providing greater protection for detained individuals after the end of the conflict than IHRL,[172] the constitutive elements of these conflicts make the determination of their end challenging.

When trying to determine the end of the application of IHL of NIAC, the ICTY found that *"*[i]*nternational humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved."*[173] Once the threshold of application is crossed, the provisions on NIAC continue to apply, regardless of the decrease of the intensity or organisation criteria.[174] Traditionally, these "peaceful settlements" are carried out via formal agreements determining the end of hostilities. Examples of such agreements are the Chapultepec Peace Agreement signed between the government of El Salvador and the *Frente Farabundo Martí para la Liberación Nacional*,[175] the Arusha Peace and Reconciliation Agreement for Burundi,[176] and the Agreement on a ceasefire between

[171] Article 2(2), Additional Protocol II.
[172] Gabriella Venturini, 'The Temporal Scope…' *supra* at 167, 61.
[173] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, supra at 44, par. 70.
[174] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgement (Trial Chamber), *supra* at 74, par. 100.
[175] United Nations General Assembly Peace Agreement, U.N. Doc. No. A/46/864-S/23501, Annex I, 30 January 1992.
[176] Arusha Peace and Reconciliation Agreement for Burundi of 28 August 2000 <https://peacemaker.un.org/sites/peacemaker.un.org/files/BI_000828_Arusha%20Peace%20and%20Reconciliation%20Agreement%20for%20Burundi.pdf> accessed 09 April 2023.

the Government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tigers of Tamil Eelam.[177]

As the situation in Burundi has demonstrated, the signing of a peace agreement does not prevent the continuation of the conflict, exposing a major flaw with the abovementioned stance. A better position indicates that, instead of concentrating in the formal elements, the real parameters to determine the end of application of the IHL of NIAC should be the factual ones. In the same manner that the start of application on IHL is determined by increasing levels of violence and organisation, its end should be equally based on these factors. The moment a conflict ceases from being protracted or an NSAG involved in it loses its organisation capacity, the conflict ceases to be an armed conflict.[178] This decreasing arch would be gradually applicable throughout the whole scope of NIACs, with conflicts regulated by APII becoming a CA3 conflicts over time, and then finally slipping under the threshold of a NIAC, becoming an internal disturbance or tension until it finally dissipates. A final situation in which the law of NIACs would cease to apply would be in case one of the parties to the conflict achieves a complete military victory over the opposing party, before the defeated belligerent's capabilities have fallen below the minimum threshold of application of NIAC.[179]

## 2. The application of IHRL in NIACs

A contentious topic, the application of IHRL in NIACs, will be discussed in present chapter, taking into account a series of progressive elements. Initially, the application

[177] Agreement on a ceasefire between the Government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tigers of Tamil Eelam of 22 February 2002.
[178] Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 253; and Marco Milanovic, 'The end of application…', *supra* at 166, 180.
[179] Sandesh Sivakumaran, *The Law of Non-International… ibid*; and Marco Milanovic, 'The end of application… *ibid.*

of IHRL to situations of armed conflict will be analysed. While not universally accepted, this idea has been supported by a majority of the modern scholarship.[180] Despite this common agreement, the concurrent application of IHL and IHRL has been very contentious, especially in the approach to the principle of *lex specialis*. Following the explanation on the interaction between both systems, a progressive examination will be carried out in relation to the application of IHRL to NSAGs.

### *2.A. Concurrent application: IHRL and IHL*

The relationship between IHRL and IHL has been one of separation, up until the 1960's, when the two international covenants on human rights were adopted. This development, coupled with the conflicts in Vietnam, Nigeria as well as the Israeli occupation of Palestine in 1967, sparkled the first questions in relation to the application of IHRL to situations of armed conflict.[181] Since then, the gradual study of the concomitant application of these legal regimes has developed to become the focus of many researchers,[182] as well as one of the main points in discussions relating to the legal framework applicable to armed conflicts.

Before addressing the topic, it is important to observe their origins, as it helps explain the nature of this relationship. The idea that both IHRL and IHL share, in their essence, the principle of respect for human dignity was first put forward in a mainstream manner in the *Furundžija* case at the ICTY. In this judgement, when discussing the international protection of civilians from sexual violence, the tribunal,

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[180] Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015), 1.
[181] Noëlle Quénivet, 'Introduction: The History of the Relationship Between International Humanitarian Law and Human Rights Law' *in* Roberta Arnold and Noëlle Quénivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhof 2008), 4.
[182] *ibid*, 1.

making a general statement, declared that both branches of international law have the respect for human dignity as their genesis.[183]

The origins of IHL, the attempt to regulate warfare and epitomised by the Martens Clause, may seem to point in the direction of a system aimed at its essence at the protection of human dignity. Nevertheless, if attention is to be paid to the wider context, it becomes clear that the objective of the laws of war is to, instead, prevent unnecessary suffering arising from means and methods of warfare.[184] In this sense, the Martens Clause itself does not specify the content of the laws of humanity or the requirements of public conscience that it refers to. The preamble of the 1899 Hague Convention, for example, states that *"In view of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war so far as military necessities permit, are destined to serve as general rules of conduct for belligerents in their relations with each other and with populations."* This text is an evident indication of this rationale.[185]

Seen from this perspective, the difference in origin, as well as in the rules and aims of both regimes would make them self-contained, and consequently prevent the creation of any kind of unified objective or of any relationship other than of exclusion.[186] This position is nevertheless, considered minoritarian, even among

[183] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Anto Furundžija*, Judgement (Trial Chamber), IT-95-17/1-T, 10 December 1998, par. 183.
[184] David Luban, 'Human Rights Thinking and the Laws of War' *in* Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge University Press 2016), 50-54.
[185] *ibid,* 53.
[186] For instance, Iain Scobbie, 'Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict' (2009) 14(3) *Journal of Conflict & Security Law*, 456; and Barry A. Feinstein, 'The Applicability of the Regime of Human Rights in Times of Armed Conflict and Particularly to Occupied Territories: The Case of Israel's Security Barrier' (2005) 4(2) *Northwestern Journal of International Human Rights*, 301.

those who defend it.[187] The idea that any legal regime of international law is entirely self-contained is a mistake, as general international law will always play the role of normative background to this hypothetical legal framework, as well as supplementing and providing safeguard provisions in case of regime failure.[188] Particularly in relation to IHRL and IHL, the claim on their self-contained nature does not sustain itself, as there are no clear boundaries separating both legal branches, so that issues of exceptionality, speciality or interpretation never occur. The discussion regarding which framework is considered as *lex specialis* is the prime example of their mutual permeability.[189]

*2.A.1. The principle of* lex specialis *between IHRL and IHL*

As it was previously mentioned, the interaction between the two branches of international law was a non-issue up until the end of the Second World War – considering that there was no IHRL to interact with the laws of war –, the discussion only gaining real traction by the 1960's. Nevertheless, the arising conflict of norms was not consistently framed as a matter of *lex specialis* before the ICJ *Nuclear Weapons* advisory opinion in 1996,[190] a position that was further expanded by the Court's *The Wall* advisory opinion in 2004,[191] which provided the basis for the mainstream discussion that followed.[192]

[187] Bill Bowring, 'Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights' (2010) 14(3) *Journal of Conflict & Security Law*, 485.
[188] Gerd Oberleitner, *Human Rights in Armed Conflict… supra* at 180, 85.
[189] *ibid.*
[190] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996 *(Nuclear Weapons advisory opinion)*.
[191] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004 *(The Wall advisory opinion).*
[192] Gerd Oberleitner, *Human Rights in Armed Conflict… supra* at 180, 89-93; and Marko Milanovic, 'The Lost Origins of *Lex Specialis*' *in* Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge University Press 2016), 82-90.

The principle of *lex specialis derogat legi generali* was an established principle to address norm collision in domestic law before being adopted in international law. In situation in which two norms could be applicable to a situation, the norm of special character will always prevail over the norm of general character.[193] It is important to note that, even though not being explicitly mentioned in the Vienna Convention on the Law of the Treaties (VCLT), the principle is regularly applied in accordance to articles 31 and 32 of the treaty, as a supplementary means of interpretation.[194] Additionally, the principle of *lex specialis* plays a prominent role in the analysis of the scope of application of both conventional and customary international law.[195] The preference for the application of this principle can be explained by the apparent agreement on the involved parties on the discussed issue, that in the end generated a more specific norm, which in its turn may impose an obligation that is seen as more binding than that emanated from a general norm.[196] Moreover, a special rule – a more elaborated and usually clearer obligation – is seen as a more appropriate tool to deal with a specific problem, generating a better solution than relying on general, and oftentimes vague, dispositions.[197]

On the downside, the principle's own nature has never been adequately clarified. While the majoritarian position in the scholarships seems to point out that the principle of *lex specialis* is an interpretative process inherent to the field of international law, as opposed to being part of customary international law, the question still lacks considerable exploration, specially taking into account the

[193] Gerd Oberleitner, *Human Rights in Armed Conflict… supra* at 180, 87.
[194] Connor McCarthy, 'Legal Conclusion or Interpretative Process? *Lex Specialis* and the Application of International Human Rights Standards' *in* Roberta Arnold and Noëlle Quénivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhof 2008), 104.
[195] *ibid.*
[196] Gerd Oberleitner, *Human Rights in Armed Conflict… supra* at 180, 87.
[197] *ibid.*, 87-88.

practical and theoretical problems arising from its application.[198] Another layer of complexity that is added to the discussion, is the issue of hierarchical relationship between norms. While the principle is applied with no problem in the municipal sphere; since there is a clear hierarchy between norms and a single, centralised legislator; the same cannot be said about its application in the international realm.[199] The existence of soft-law obligations with fluid legal quality, as well as the inconsistent use of the principle by international tribunals both in their own jurisprudence and in relation to other tribunals' decisions (the International Law Commission, in a study on the fragmentation of international law found that tribunals apply the principle of *lex specialis*, without much elaboration, in four different situations)[200] only serve to further complicate the problem.[201]

*2.A.2. The application of* lex specialis *by the International Court of Justice*

As mentioned earlier, the ICJ, taking into account the lack of a legal device to solve eventual norm conflicts between IHRL and IHL, was the main proponent of the adoption of the principle of *lex specialis* to solve conflicts between these two branches of international law. The tribunal first did so in its *Nuclear Weapons* advisory opinion, and later in another advisory opinion: *The Wall.* Interestingly enough, in the third instance in which a conflict between IHRL and IHL norms was confronted by the court – in the *Democratic Republic of Congo v. Uganda* case –[202] it chose not to apply the principle, reinforcing the International Law Commission's

[198] *ibid.* 88. For a detailed discussion on the nature of the principle of *lex specialis*, *vide* Connor McCarthy, 'Legal Conclusion or Interpretative Process…' *supra* at 194.
[199] Anja Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*' (2005) 74(1) *Nordic Journal of International Law*, 39-40.
[200] International Law Commission, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law – Report from the Study Group of the International Law Commision, finalised by Martti Koskenniemi*, 13 April 2006, A/CN.4/L.682, par. 68.
[201] Gerd Oberleitner, *Human Rights in Armed Conflict… supra* at 180, 88; and Anja Lindroos, 'Addressing Norm Conflicts…' *supra* at 199, 48.
[202] International Court of Justice, *Case Concerning Armed Activities of the Territory of the Congo*, Judgement of 19 December 2005 (Democratic Republic of Congo v. Uganda).

conclusion that this device is not used in a coherent manner by international courts and tribunals. This somewhat inconsistent behaviour was carried out to other international tribunals, such as the Inter-American Court of Human Rights (IACH), the European Court of Human Rights (ECoHR) and the African Commission of Human and Peoples Rights.[203]

In the *Nuclear Weapons* advisory opinion, the ICJ, provoked by the World Health Organisation and the UN General Assembly, analysed the legality of the use of nuclear weapons taking into account the right to life contained in article 6 of the International Covenant on Civil and Political Rights (ICCPR) and under IHL. When confronted with the relationship between the right not to be arbitrarily deprived of one's life, contained in article 6(2) of ICCPR and the rules on targeting existent in IHL, the ICJ remarked

> *'The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.'*[204]

[203] For a detailed analysis on the relationship between international human rights and humanitarian law in the three regional tribunals, see Gerd Oberleitner, *Human Rights in Armed Conflict… supra* at 180, 271-315; Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23(1) *European Journal of International Law*; Françoise Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body' (2008) 90(871) *International Review of the Red Cross*.

[204] International Court of Justice, *Nuclear Weapons advisory opinion, supra* at 190, par. 25.

This statement has been the subject of various interpretations, originating three mainstream scholarship strands of application of *lex specialis*, that will be examined further below. Despite the many diverging positions, what can be clearly understood from the opinion is that there is an obligation to interpret a specific norm of IHRL taking into account a special norm in IHL, considering that IHL contains specific rules on the subject.[205] Among the most common critics received by the Tribunal, stemming from the advisory opinion, the argument that the principle of *lex specialis* was mentioned without further explanations,[206] and that the ICJ arbitrarily adopted a more lenient standard on permissible killings in armed conflict (the one contained in IHL) instead of a more special standard on the matter (the one dictated by IHRL) were the most common.[207] In addition to that, it is worth mentioning, for the purposes of the present work, that the advisory opinion took into consideration only the situation of a hypothetical IAC, ignoring the possibility of the deployment of a nuclear weapon in the context of an armed conflict waged against NSAGs.[208]

### *2.A.3. Different theories of application of* lex specialis

In the subsequent opportunity the ICJ had to elaborate its idea of *lex specialis* in international law, in *The Wall* advisory opinion, the Court presented the idea that there are three possible degrees of application of the principle of *lex specialis* to the relationship between IHRL and IHL

> (…) *As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be*

[205] Gerd Oberleitner, *Human Rights in Armed Conflict… supra* at 180, 90.
[206] Vera Gowland-Debbas, 'The Right to Life and Genocide: The Court and International Public Policy' *in* Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press 1999), 321-326.
[207] Gerd Oberleitner, *Human Rights in Armed Conflict… supra* at 180, 91.
[208] Philip Alston, Jason Morgan-Foster and William Abresch, 'The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflicts: Extrajudicial Executions in the "War on Terror"' (2008) 19(1) *European Journal of International Law*, 191.

> *exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law.*[209]

This clarification was divisive among the scholarship, even though it was undoubtedly a recognition of the concurrent application of both legal frameworks in certain situations.[210] On one side, the Court's position was considered to be too abstract, concentrating on hypothetical situations and not offering the necessary guidance for the application in a real scenario.[211] On the other hand, the decision was praised for introducing the notion of complementarity to the relationship between this two branches of international law, while still maintaining the principle of *lex specialis*, and for proposing that a mutual interpretation should be sought instead of the notion that one system should prevail over the other.[212] Both advisory opinions have nevertheless created great confusion on the application of the principle, as they both refer to the use of *lex specialis* in an abstract manner, not actually applying it, even when analysing article 12 of ICCPR in relation to the Israeli occupation.[213]

On the first time, and so far the only,[214] the ICJ was tasked with handing a binding decision on the application of IHRL to a situation of occupation – in the *Democratic*

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[209] International Court of Justice, *The Wall advisory opinion*, *supra* at 191, par. 106.
[210] Gerd Oberleitner, *Human Rights in Armed Conflict… supra* at 180, 90.
[211] See, for instance, Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009), 87; and Roger O'Keefe, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Commentary' (2004) 37(1) *Revue Belge de Droit International*, 135-140.
[212] See, for example, the opinions of William Schabas, 'Lex Specialis? Belts and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum' (2007) 40(2) *Israel Law Review*, 597; and United Nations Sub-Commission on the Promotion and Protection of Human Rights, Administration of Justice, Rule of Law And Democracy: Working paper on the relationship between human rights law and international humanitarian law by Françoise Hampson and Ibrahim Salama, E/CN.4/Sub.2/2005/14, 21 June 2005, par. 57.
[213] Yoram Dinstein, *The International Law of Belligerent… supra* at 211, 87.
[214] Philip Alston, Jason Morgan-Foster and William Abresch, 'The Competence of the UN Human…' *supra* at 208.

*Republic of the Congo v. Uganda* case –[215] the court shied away from mentioning the principle. While recognising the application of IHRL to the Ugandan occupation of Congolese territory, its violation by the former, the Court failed to expand on its view on the interplay between the two systems, not even mentioning the term *lex specialis*.[216]

As it was pointed out by Oberleitner, these three decisions from the ICJ seem to point out to a distancing from the idea of *lex specialis*. While in the *Nuclear Weapons* opinion the Court has apparently favoured the application of IHL over IHRL, in the *The Wall* the opinion seemed to propose a balanced application of the two regimes. Finally, in the *Democratic Republic of the Congo v. Uganda*, the silence of the Court – while still explicitly recognising the application of IHRL to situations in which IHL is also applicable – could suggest a move away from the *lex specialis* altogether. Considering the very few instances in which the Court has been called to decide on the matter, its intentions are still unclear, what has consequently created a divide in the scholarship, with three dominant theories.[217]

Total displacement:

The first approach to *lex specialis*, the total displacement approach, proposes that IHL should apply in full, with the total exclusion of IHL. This position is a repackaging of the classical theory that opposed the law of war to the law of peace and is currently defended by a few states: the United States, Israel, and Russia – being only consistently adopted by the first, with a notable softening in the latter years of the George W. Bush administration. The total displacement approach tries to

[215] International Court of Justice, *Democratic Republic of Congo v. Uganda*, *supra* at 202.
[216] Gerd Oberleitner, *Human Rights in Armed Conflict… supra* at 180, 92-93.
[217] *ibid.*, 93.

reintroduce the law of war/law of peace dichotomy using the ICJ's *lex specialis* theory, combined with the total rejection of the extraterritorial application of IHRL treaties.[218]

A notable example of this approach can be seen in the United States' response to the Inter-American Commission of Human Rights on the precautionary measures in relation to the treatment of detainees in Guantánamo Bay. In their response, the United States claimed that IHRL is a totally separate regime from IHL, the former not being applicable to the conduct of hostilities and the detention of combatants.[219] This position is further reinforced by a series of policy considerations, under the rationale that the application of IHRL to situations of armed conflict or belligerent occupation could undermine the state's freedom to act and put an unnecessary burden on the military in the planning of operations, as well as increase the risk of criminal prosecution of its personnel.[220] Nevertheless, this position the largely majoritarian support for the application of IHRL in armed conflict, being referred to by Nils Meltzer – appropriately – as anachronistic.[221]

Among the examples of this support, it is prominent the International Law Commission's Draft Articles on the Effects of Armed Conflicts on Treaties, which states, in its article 3 that *"*[t]*he existence of an armed conflict does not* ipso facto *terminate or suspend the operation of treaties: (a) as between States parties to the conflict; (b) as between a State party to the conflict and a State that is not"*.[222]

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[218] Marko Milanovic, 'The Lost Origins…' *supra* at 192, 103-105.
[219] United States, 'Response of the United States to Request for Precautionary Measures – Detainees in Guantanamo Bay, Cuba (15 April 2002)' (2002) 41(4) *International Law Materials*.
[220] Michelle Hansen, 'Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict' (2007) 194 *Military Law Review*.
[221] Nils Meltzer, *Targeted Killing in International Law* (Oxford University Press 2008), 79.
[222] Article 3, International Law Commission, Draft Articles on the Effects of Armed Conflicts on Treaties, A/66/10, para. 100, 2011.

Additionally, this position goes against derogation clauses of many human rights treaties,[223] which in many cases explicitly mention "war" as a factor for their applicability, these provisions being a pointless effort if IHRL would cease to apply in situations of armed conflict.[224] Finally, this approach is in opposition with the same jurisprudence that created it. The *Nuclear Weapons* advisory opinion and the subsequent decisions from the ICJ all defend the idea that IHRL treaties continue being applied during armed conflict.[225]

Partial displacement:

The second theory, the partial displacement approach, recognises that both legal regimes apply in armed conflict, with both being considered as complementary and not mutually exclusive. It treats the principle of *lex specialis* as a tool of norm conflict resolution. In the majority of cases, the relationship between IHRL and IHL is, indeed, one of complementarity, with both regimes regulating the same issue in the same manner, for example, the prohibition of torture, which is prohibited by both. Another possible complementary interaction happens with one area filling the gaps left by the other, as can be seen by the absence of a disposition relating to freedom of expression in occupied territories under IHL, which is solved by IHRL.[226]

The problem with this approach starts to become evident in those exceptional situations in which IHRL and IHL do conflict. An opportune example being in matters of detention. In such cases these branches of law regulate the same topic in differently, making it impossible to avoid the normative conflict. In this situation,

[223] Including article 27, American Convention on Human Rights. 22 November 1969; article 15, European Convention on Human Rights. 4 November 1950; and article 2(2), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 4 February 1985.
[224] Marko Milanovic, 'The Lost Origins…' *supra* at 192, 104.
[225] *ibid*.
[226] *ibid.*, 106.

adopting a partial displacement approach, IHL, being the *lex specialis*, would displace IHRL to the extent that is necessary to resolve such conflict.[227]

Norm conflict avoidance:

The third method adopted to interpret the principle of *lex specialis* between IHRL and IHL is by applying a norm conflict avoidance approach.[228] According to this method, the principle would be, as stated above, a manifestation of the principle contained in article 31(3)(c) of the VCLT. This article determines that, when interpreting treaties, one should always take into account other relevant rules of international law that are applicable between the parties.[229] In this sense, the norm contained in CA3 relating to minimum standards of a fair trial, that determine that sentences cannot be passed *"*[…] *without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples*",[230] as well as its equivalent in APII, that lays down a generic set of requirements for the passing of sentences,[231] should be interpreted in relation to IHRL treaties. These would include the ICCPR, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights and the ECoHR. Furthermore, human rights tribunals and bodies should also guide this interpretation, since in this case IHRL possesses more detailed rules than IHL.[232]

This approach does not presuppose the primacy of IHL over IHRL. The first regime cannot displace the more detailed rules of the latter. In this case, IHL would still be an important factor in the interpretation of the norm, but it would not be the only one.

[227] *ibid.,* 106-107.
[228] *ibid.*, 107.
[229] Connor McCarthy, 'Legal Conclusion or Interpretative Process…' *supra* at 194, 104.
[230] Common Article 3.
[231] Article 3, Additional Protocol II.
[232] Marko Milanovic, 'The Lost Origins…' *supra* at 192, 107.

Norms in this case should be interpreted in light of other legal regimes, but still only to the point these influences do not decharacterise the norm's original purpose.[233] This approach has also been called complementary, "cross-pollination",[234] and "cross-fertilisation",[235] considering the two-way relationship between the systems.[236]

This boundary between interpretation and modification, as well as the exact definition of complementarity and its similar terms is unclear. While it is clear that this conflict avoidance approach does not propose separation of legal regimes, it does not support their integration either. Instead, this form of complementary dictates the manner in which two frameworks connect and interact, without losing their individual shape.[237]

Norm conflict resolution or interpretive tool?

Taking into account the very limited support for the total displacement approach, and more importantly, its technical flaws, the most appropriate approach to the application of the principle of *lex specialis* to the relationship between IHRL and IHL must necessarily be either the norm conflict resolution or the interpretive tool method. Considering both approaches, it seems an unavoidable conclusion the idea that the principle of *lex specialis* should be seen as an interpretive tool of norm avoidance, that works as a complement between the two regimes.[238]

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[233] *ibid.,* 108.
[234] René Provost, *International Human Rights… supra* at 141, 350.
[235] Cordula Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40(2) *Israel Law Review*, 341.
[236] Gerd Oberleitner, *Human Rights in Armed Conflict… supra* at 180, 107.
[237] *ibid.,* 106.
[238] In this sense, see Gerd Oberleitner, *Human Rights in Armed Conflict… supra* at 180, 106-121; and Marko Milanovic, 'The Lost Origins…' *supra* at 192, 108-114.

The idea behind the norm conflict resolution approach is that the legislator could not have intentionally created two hierarchically equal norms with conflicting content.[239] Particularly, this reasoning defends that the international legislators could not have agreed to create IHRL norms that are more general and restrictive than those of IHL, and at the same time also applicable to situations of armed conflict. In this sense, states have not agreed to impose further limits to armed conflicts than those included in IHL, otherwise the balance between military necessity and humanitarianism would cease to exist.[240]

As pointed out by Milanovic in multiple occasions, this conclusion is flawed, being nothing more than a fiction.[241] It is important to point out that conflicting norms in domestic law are a constant, even if considering the simpler hierarchical structure that exists in such legal order. To believe that such mistakes do not occur in the international sphere, where heterogeneous and decentralised norms are a constant, is naïve to say the least. Consequently, instead of attempting to resolve conflicts that are sometimes unsolvable, it seems more appropriate to tackle these problem by avoiding such conflicts and building a complementary relationship between regimes. This position has received widespread support from both the scholarship and international jurisprudence with human rights bodies, such as the UN Human Rights Committee,[242] as well as organisations such as the ICRC.[243]

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[239] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003).
[240] Marko Milanovic, 'The Lost Origins…' *supra* at 192, 109.
[241] Marko Milanovic, 'Norm Conflict in International Law: Wither Human Rights?' (2009) 20(1) *Duke Journal of Comparative and International Law*, 69; 'Extraterritorial Application of Human Rights Treaties: Law Principles and Policy' *in* Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law:* Pas de Deux (Oxford University Press 2011), 229-230; and 'The Lost Origins…' *supra* at 192, 109.
[242] United Nations Human Rights Committee, *General Comment No. 31 (Article 2) on the Nature of the General Legal Obligations imposed on State Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, par. 11.

### *2.B. The application of IHRL to NSAGs*

After analysing in detail the interplay between IHRL and IHL, particularly under the theory of *lex specialis*, this chapter will examine the application of IHRL to NSAGs. Firstly, the applicability of international law to these groups will examined, followed by an analysis on the *de facto* control theory. In sequence, the theories regarding the imposition of IHRL obligations to NSAGs will be fleshed-out, and finally, an overview of the gradated approach of IHRL obligations applicable to these groups will be presented.

In contrast to IHL, which is widely accepted as being applicable to NSAGs,[244] the application of IHRL to these entities is highly contentious. The criticism to the application of this branch of international law varies from total rejection,[245] to a series of restrictive approaches, which include the possession of such obligations only once in control of territory[246] or in situations outside of armed conflict situations.[247] On the other hand, recent scholarship has been developed in support of the application of IHRL to NSAGs, and have greatly expanded the discussion.[248] Despite the apparent overwhelming support for the former position in international jurisprudence and state

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[243] See, for instance, Jakob Kellenberger, 'Protection Through Complementarity of the Law' *in* International Institute of Humanitarian Law (ed), *International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence. Challenges and Prospects. 27th Round Table on Current Problems of International Humanitarian Law, Sanremo, 4-6 September 2003* (International Institute of Humanitarian Law 2003), 9-16.

[244] See, for example, Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 236-242.

[245] For instance, Lindsay Moir, *The Law of Internal… supra* at 2, 194-195.

[246] *Vide* Liesbeth Zegveld, *Accountability of Armed Opposition… supra* at 56, 38-55; and Nigel Simon Rodley, 'Can Armed Opposition Groups Violate Human Rights?' *in* Kathleen Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-First Century* (Kluwer 1993).

[247] See Tillman Rodenhäuser, 'Human Rights Obligations of Non-State Armed Groups in Other Situations of Violence: The Syria Example' (2012) 3 *International Humanitarian Legal Studies*.

[248] For example. Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016); and Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017).

practice, there has been a growing tendency to recognise, in exceptional situations, the latter point-of-view.[249]

*2.B.1. How can NSAGs be subjected to international law?*

Before concentrating in the applicability of IHRL to NSAGs, it is important to determine how international law, in general, applies to these organisations. Initially, in order to have international rights and obligations, an entity must possess international legal personality (ILP), as it occurs in any legal system.[250] An appropriate definition proposes that inside a legal system, the attribution of legal personality is what enables an entity to function in a legal order, being the same legal order that determines who can participate in it and who cannot.[251] In this sense, the only mean by which an entity can participate in the international legal order is by being recognised by it as being capable of participating. Even though traditionally the idea of ILP is seen as equal to the idea of statehood, these are distinct concepts, the former being gradually extended to other non-state subjects of international law, such as international and multinational organisations, non-governmental organisations, and NSAGs.[252]

<u>Determining international legal personality:</u>

Contrary to municipal law, there is no unified law of persons in international law, and consequently, there is no instrument that can determine definitively which institutions possess ILP.[253] This has in its turn lead to considerable uncertainty and divergence in relation to the requisites necessary for the recognition of personality. The most

[249] Katharine Fortin, *The Accountability of Armed… ibid.*, 3-5.
[250] Robert McCorquodale, 'The Individual and the International Legal System' *in* Malcolm Evans (ed), *International Law* (5th edn. Oxford University Press 2018), 308.
[251] Catherine Brolman, *The Institutional Veil in Public International Law: International Law and the Law of Treaties* (Hart 2007), 68.
[252] Daragh Murray, *Human Rights Obligations… supra* at 248, 27-29.
[253] Roland Portmann, *Legal Personality in International Law* (Cambridge University Press 2010), 1.

prominent theories can be divided into five categories: states-only, recognition, individualistic, formal, and actor theories.[254]

The states-only theories defend the idea that states are the only subjects of international law, and therefore, the only legal requirement necessary for ILP is the acquisition of statehood.[255] These theories have been rejected numerous times by the ICJ.[256] These approaches have since evolved to recognition theories. Recognition theories hold that states have the exclusive power to create other international entities, through acts of implicit or explicit recognition. These new entities would possess limited rights, obligations and capacities, in accordance to the act from which their recognition is derived from.[257] The justifications for these theories are usually derived from the *Reparations* advisory opinion, where it is submitted that the ICJ has based the UN international legal status on implicit recognition acts from its founding members.[258] The recognition theories, nevertheless, ignore the importance of the adoption of objective legal criteria. This leads to mistakes that are a consequence of the exclusively political nature of these decisions, which can oftentimes be unsound, due to states' refusal to recognise *de iure* already established *de facto* situations.[259]

The individualistic theories, on the other hand, consider the human being as the ultimate international person, capable of possessing international rights and

[254] *ibid.*, 2.
[255] *ibid.,* 7.
[256] See for instance, International Court of Justice, *Reparations for injuries suffered in the services of the United Nations*, advisory opinion of 11 April 1949 (Reparations advisory opinion), par. 25; and *Nuclear Weapons advisory opinion, supra* at 190, par. 25.
[257] Roland Portmann, *Legal Personality in International Law supra* at 253, 83.
[258] *ibid.*, 105.
[259] Daragh Murray, *Human Rights Obligations… supra* at 248, 30.

obligations.[260] According to this approach, the individuals are considered *a priori* an international subject, the state being a mere object, or an entity, created by individuals pursuing their interests.[261] Nevertheless, these theories fail to recognise the role of states as direct subjects of international law, as evidenced by the *Reparations* advisory opinion or the UN Charter.[262] The formal theories determine that international law is, in itself, an open system with no presumptive subjects. In this sense, any entity may become a subject of international law, with no specific consequences from becoming so.[263] The main problem with such theories is that they downplay the significant role played by state will, and consequently the role played by state recognition, which is clear in decisions such as the *Nuclear Weapons* advisory opinion.[264] Finally, actor conception theories supports the idea that international law is not a set of rules, but an authoritative decision-making process, based on effective participation, and in this sense, to participate is to be a subject of international law.[265] This final strand of theories fails to recognise the dominant position held by states in the international legal order, and the current international jurisprudence, such as the *Reparations* and the *Western Sahara*[266] advisory opinions, that rely on legal criteria for the determination of ILP, in opposition to the idea that mere participation leads such recognition.[267]

As can be noted by these theories, they can be divided roughly into two groups: constitutive and declarative, with personality being recognised either by state will

[260] Roland Portmann, *Legal Personality in International Law supra* at 253, 128.
[261] *ibid.*, 126-129.
[262] Daragh Murray, *Human Rights Obligations… supra* at 248, 31.
[263] Roland Portmann, *Legal Personality in International Law supra* at 253, 177.
[264] International Court of Justice, *Nuclear Weapons advisory opinion, supra* at 190, par. 19.
[265] Roland Portmann, *Legal Personality in International Law supra* at 253, 213.
[266] International Court of Justice, *Western Sahara*, advisory opinion of 16 October 1975 (Western Sahara advisory opinion), par. 148.
[267] Daragh Murray, *Human Rights Obligations… supra* at 248, 33.

(states-only and recognition theories) or objective legal criteria (individualistic, formal and actor theories). The opposition between those two groups has resulted that no theory accurately reflects modern international law. A more accurate view of the current state of the international legal order would point to the adoption of elements of both categories.[268]

Deriving from these theoretical elements, it is necessary to establish the criteria necessary for the acquisition of ILP. It must be taken into consideration that, as stated above, an international legal person must be subjected to direct international rights and obligations, which makes the entity's independent existence an essential criterion to the recognition of personality.[269] Considering there are no further explicitly specified criteria, it is necessary to conduct a jurisprudential analysis to determine them. From the *Reparations* advisory opinion, it is possible to establish two further criteria, namely the capacity to possess international rights and obligations and the capacity to bring international claims.[270] Finally, part of the scholarship chooses to concentrate on a different element, the actual possession of international right and obligations.[271]

The first criterion, independence, can be verified by the direct attribution of rights and obligations,[272] which can be demonstrated by the absence of a superior authority. In the case the rights or obligations do not stem from the entity itself, but from another

[268] See, for instance, Malcom Shaw, *International Law* (5th edn Cambridge University Press 2003), 183, 207, 445.
[269] Daragh Murray, *Human Rights Obligations… supra* at 248, 41.
[270] James Crawford, *Brownlie's Principles of Public International Law* (9th ed Oxford University Press 2019), 309.
[271] For example, Hersch Lauterpacht, 'The Subjects of International Law' *in* Andrea Bianchi (ed), *Non-State Actors and International Law* (Ashgate 2009), 5.
[272] Dapo Akande, 'International Organisations' *in* Malcolm Evans (ed), *International Law* (5th edn Oxford University Press 2018), 281.

entity, then it is this entity the one possessing ILP.[273] The second criterion, capacity to possess international rights and obligations, is derived from international jurisprudence and as stated above, a consistent position in the scholarship. This element is reinforced by the principle of effectiveness, that determines that *"*[…] *only claims and situations which are effective can produce legal consequences"*.[274] Consequently, an entity can only be considered to have international rights and obligations if it has the actual capacity to possess them.[275] In the *Reparations* advisory opinion, the ICJ concluded that the UN is a subject of international law and capable of possessing international rights and obligations,[276] being the organisation's legal personality dependent on the power to impose its rights in face of its members.[277] The Court then went on to establish that an entity's organisational characteristics will be the determining factor in relation to its capacity to possess international rights and obligations. According to the ICJ, the entity must be structured in a way that it is capable of binding its members to the observance of these duties.[278] This idea was reproduced in the *Western Sahara* advisory opinion.[279]

Despite being similar to the previous criterion, the actual possession of international rights and obligations is actually capable of generating personality. The theoretical capacity to do so does not allow for a judgement to determine if these entities are

[273] Antonio Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 2 *International and Comparative Law Quarterly*, 429.
[274] Antonio Cassese, *International Law supra* at 162, 71.
[275] Fergus Green, 'Fragmentation in Two Dimensions: The ICJ's Flawed Approach to Non-State Actors and International Legal Personality' (2008) *9 Melbourne Journal of International Law*, 50.
[276] International Court of Justice, Reparations advisory opinion, *supra* at 256, par. 179.
[277] *ibid.*, par. 178.
[278] *ibid.*
[279] International Court of Justice, Western Sahara advisory opinion, *supra* at 266, par. 148.

active participants on the international arena.[280] For instance, in the *Reparations* advisory opinion, the ICJ analysed the UN possession of rights and obligations taking into account its actual possession of direct rights and obligations, as determined by the UN Charter's provisions and the intent of its drafters.[281] It is important to note that the possession of direct rights and obligations can be a consequence of the application of international treaty law, such as in the case of NSAGs parties to an armed conflict regulated by CA3, or CIL.[282] Finally, some authors have pointed out that the capacity to bring claims could be considered a criterion for the acquisition of ILP.[283] This proposition is based on the decision on the *Reparations* advisory opinion, in which the Court held that the UN's legal personality means that it is capable of possessing international rights and obligations and the capacity to maintain its rights by bringing international claims.[284] This position has been disputed, since a more logical conclusion seems to indicate that the Court, after deciding for the existence of the UN's legal personality, went on to describe the consequences of this personality, which included the capacity to bring international claims.[285] Thus, being the result of the UN's subject specific personality, it is submitted that the capacity to bring international claims cannot be considered one of the criteria for its determination.[286]

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[280] Daragh Murray, *Human Rights Obligations… supra* at 248, 45.
[281] International Court of Justice, Reparations advisory opinion, *supra* at 256, pars. 178-179.
[282] For example, International Court of Justice, Interpretation of the Agreement of 25 March 1951 between WHO and Egypt, advisory opinion of 20 December 1980 (Interpretation advisory opinion), par. 37.
[283] For example, James Crawford, *Brownlie's Principles of Public… supra* at 270, 118; and Malcom Shaw, *International Law supra* at 268, 196.
[284] International Court of Justice, Reparations advisory opinion, *supra* at 256, par. 179.
[285] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006), 65.
[286] Daragh Murray, *Human Rights Obligations… supra* at 248, 45.

The conclusion that can be obtained from the analysis of the prospective criteria for the determination of ILP is that the elements that are best suited for this test are independence and capacity to possess rights and obligations.

Determining the capacity to possess rights and obligations:

In relation to NSAGs, while the independence requirement can be determined in a straightforward manner, by verifying the absence of a hierarchically superior authority, the elements necessary for the determination of capacity are much less clear. It is generally recognised that NSAGs have their legal personality recognised when subjected to IHL, consequent to their participation in a NIAC.[287] Additionally, these groups may also be subjected to international law in the context of crimes against humanity, outside an armed conflict.[288] For this reason, the subsequent analysis will take into consideration the capacity criterion both in and outside a NIAC.

From the authoritative definition of armed conflict found in *Tadić*, an armed conflict exists whenever *"*[…] *there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State"*,[289] it is possible to establish that two elements are essential for the existence of a NIAC: the intensity of the violence and the organisation of the parties. As discussed on the previous section, the element of intensity is deemed to attract the application of IHL, being an element dependent on the relationship between the parties to the conflict, and therefore not an essential

[287] Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Compliance with International Humanitarian Law' (2010) 1 *International Humanitarian Legal Studies*, 31; Liesbeth Zegveld, *Accountability of Armed Opposition… supra* at 56, 57.
[288] Article 7(2)(a), Rome Statute…*, supra* at 21.
[289] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *supra* at 44, par. 70.

element for the determination of the NSAG's capacity to possess international rights and obligations.

On the other hand, the organisation criterion, being dependent exclusively of the NSAG, can be considered the defining element for the determination of said capacity. While it has been established that some degree of organisation is necessary,[290] the exact level of organisation necessary is somewhat of a grey zone. Despite this uncertainty, it is accepted that, even if there is a minimal degree of organisation, it should be enough to allow the NSAG to fulfil its IHL obligations.[291] This capacity to fulfil its obligations is considered to be dependent on the existence of an internal structure, which is capable of imposing its authority over its members.[292] Despite some scholars adopting the idea that this internal structure will most likely be along the lines of a traditional military hierarchy,[293] the better view seems to indicate that the traditional hierarchical military structure, is only one of the possible setups that can be adopted by a NSAGs to effectively organise themselves.[294]

A series of other elements, aside from the presence of an internal structure, were also suggested as defining organisation. In the *Lubanga* case for instance, elements such as internal hierarchy, command structure and rules, availability of military equipment, ability to plan and execute military operations, and the intensity of the conflict were all elements deemed to demonstrate the organisational criterion, even

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[290] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Judgement (Trial Chamber II), *supra* at 74, par. 89.
[291] Jelena Pejic, 'The protective scope of Common Article 3: more than meets the eye' (2011) 93(881) *International Review of the Red Cross*, 191-192; Anthony Cullen, *"The Concept of Non-International… supra* at 2, 124; and Lindsay Moir, *The Law of Internal… supra* at 2, 36.
[292] Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 174-176.
[293] For example, see Lindsay Moir, *The Law of Internal… supra* at 2, 36; and Noam Lubell, *Extraterritorial Use of Force… supra* at 91, 110.
[294] Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 172-174.

though none of these factors were considered to be individually determinative.[295] In the *Boškoski* case, the ICTY presented a review of cases, grouping these organisational elements in five groups: factors signalling the presence of a command structure, factors indicating that the group could carry out operations in an organised manner, factors indicating a level of sophistication with respect to logistics, factors indicating internal discipline, and factors indicating the ability to speak with one voice.[296] Despite the great lengths to enumerate all of the organisation elements found in that Court's jurisprudence, the elements are not very helpful, since they are not only imprecise, but oftentimes overlap, pointing out to the idea that all of these elements can be summarised by the notion of the existence of a responsible command.[297]

Even though the concept of a responsible command is generally associated with the threshold of application of APII, since its article 1 dictates *ipsis literis* that the NSAGs involved in an APII conflict must be under responsible command,[298] it is important to highlight the essential criterion to determine the level of organisation of a group. This is the ability to fulfil its obligations under IHL, that is enforced by internal discipline, which can hardly be achieved by means other than by the establishment of a responsible command.[299] This idea was reinforced in the *Akayesu* judgement,[300] and

[295] International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo*, Judgement (Trial Chamber I), *supra* at 116, par. 537.
[296] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, IT-04-82-T, Judgement (Trial Chamber II), 10 July 2008, pars. 199-203.
[297] Daragh Murray, *Human Rights Obligations…supra* at 248, 63; and Colin Warbrick, 'States and Recognition in International Law' *in* Malcolm Evans (ed), *International Law* (5th edn. Oxford University Press 2018), 229.
[298] Article 1, Additional Protocol II.
[299] Daragh Murray, *Human Rights Obligations…supra* at 248, 64.
[300] International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu*, Judgement, *supra* at 56, par. 626.

can be clearly seen in the *Boškoski* list, as all of the elements mentioned require that the responsible command that is also capable of enforcing internal discipline.[301]

Outside a situation of armed conflict, it is established that NSAGs may be subjected to the international customary prohibition on crimes against humanity, as it was demonstrated in the *Tadić* case.[302] An important element of these crimes is the existence of an organisational policy or plan.[303] The fact that under ICL, the prohibition of crimes against humanity and war crimes is a matter of individual responsibility does not preclude the possibility of a NSAG to be considered responsible for the commission of these acts.[304] The rationale behind this idea is that, if an organisation can violate international law prohibitions against crimes against humanity and war crimes, they must be subjected to an international obligations, and, since that entities in possession of rights and obligations are considered to have ILP, these organisations should have consequently acquired personality on this basis.[305]

The controversy that exists regarding the capacity of NSAGs to commit crimes against humanity, and therefore to be subjected to its prohibition,[306] has been settled at least at the jurisprudential level. Decisions from ICTR in *Kayishema and Ruzindana*,[307] the ICTY in *Kupreškić*,[308] and the ICC in *Katanga and Chui*[309] have all

[301] Daragh Murray, *Human Rights Obligations…supra* at 248, 66.
[302] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *supra* at 44, 141.
[303] Daragh Murray, *Human Rights Obligations…supra* at 248, 67.
[304] Andrew Clapham, 'The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' *in* Menno Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (Kluwer 2000), 191.
[305] Daragh Murray, *Human Rights Obligations…supra* at 248, 68.
[306] William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010), 152.
[307] International Criminal Court for Rwanda, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, 21 May 1999, par. 126.

confirmed these courts' jurisdiction over crimes against humanity committed by NSAGs.

Seeing that NSAGs are considered capable of committing crimes against humanity, and that the organisation element that permeates this capacity, the organisation criteria for the purpose of ICL must be identified. From the three abovementioned ICL tribunals' statutes, the only one mentioning the necessity of an organisational criterion is the Rome Statute.[310] As a consequence, the Court has come up with a series of decisions that analyse the elements of organisational policy necessary for the commission of such crimes, starting with in the *Ntaganda* case.[311] The ICC identified a series of factors: whether the group is under a responsible command, or has an established hierarchy; whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; whether the group exercises control over part of the territory of a state; whether the group has criminal activities against the civilian population as a primary purpose; whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; and whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.[312] Once again, these elements are a non-exhaustive list of

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[308] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić*, Judgement (Trial Chamber), IT-95-16-T, 14 January 2000, par. 551.
[309] International Criminal Court, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, *supra* at 114, par. 396.
[310] Article 7(2), Rome Statute…, *supra* at 21.
[311] International Criminal Court, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* (Pre-Trial Chamber I), ICC-01/09, 31 March 2010. Subsequent cases include, *Prosecutor v. Bosco Ntaganda*, Decision on the Prosecutor's Application under Article 58 (Pre-Trial Chamber II), ICC-01/04-02/06, 13 July 2012, par. 24; and *Prosecutor v. William Samoei Ruto*, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Pre-Trial Chamber II), ICC-01/09-01/11, 23 January 2012, par. 185.
[312] International Criminal Court, *Decision Pursuant to Article 15*…, *ibid.*, par. 93.

criteria, to be taken into consideration on a case-by-case basis.[313] As the last three factors are related to the purpose of the organisation, and as such have no impact on structural organisation, only the first three criteria are relevant to the present analysis.[314]

The first criterion, the existed of responsible command or an established hierarchy, has been a constant requirement in the jurisprudence of the ICC, with the evolving concept involving an identifiable, a typically hierarchical, organisation structure.[315] This idea has been present for example in the *Muthuaura, Kenyatta and Ali* case, where the NSAG was recognised as possessing a hierarchical organisation and defined roles for its members.[316] This was also the case in *Ntaganda*, where it was considered whether the organisation was under responsible command and successfully established a hierarchy.[317]

Another factor that was deemed to demonstrate a responsible command was the NSAG's capacity to impose internal discipline. Decisions such as *Muthuaura, Kenyatta and Ali*, *Ntaganda and Ruto, Kosgey and Sang* all reference elements that imply that some sort of internal hierarchy capable of communicating its orders being obeyed were in place.[318] The second element, the possession of means to carry out

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[313] *ibid.*
[314] Daragh Murray, *Human Rights Obligations…supra* at 248, 70-71.
[315] *ibid.*, 71.
[316] International Criminal Court, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Pre-Trial Chamber II), ICC-01/09-02/11, 23 January 2012, par. 190.
[317] International Criminal Court, *Prosecutor v. Bosco Ntaganda*, Decision on the Prosecutor's Application under Article 58 (Pre-Trial Chamber II), *supra* at 311, par. 26.
[318] See for instance, International Criminal Court, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Pre-Trial Chamber II), *supra* at 316, par. 207; *Prosecutor v. Bosco Ntaganda*, Decision on the Prosecutor's Application under Article 58 (Pre-Trial Chamber II), *supra* at 311, par. 26; and *Prosecutor v. William Samoei Ruto*, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Pre-Trial Chamber II), *supra* at 311, pars. 142-143.

a widespread or systematic attack against the civilian population, was also a consistent requirement at the ICC. Decisions such as *Bemba Gombo*,[319] *Katanga* and *Chui*,[320] *Ruto, Kosgey and Sang*,[321] and *Ntaganda*[322] all enumerated elements that draw a direct relationship between the group's organisation to its capacity to carry out widespread attacks. These elements include access to weaponry, trained manpower, lines of communication among others. Therefore, it is submitted that, a systematic attack is dependent on a preconceived policy or plan, which in turn necessarily requires a level of organisation.[323] As it was clearly stated in *Akayesu*: *"The concept of 'systematic' may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources"*.[324]

Finally, the requirement of the exercise of territorial control, was not considered a recurring criterion for the ICC, as opposed to the previous elements, as it was not mentioned in *Katanga,*[325] *Ruto, Kosgey and Sang,*[326] *Ntaganda*[327] or *Katanga and*

[319] International Criminal Court, *Prosecutor v. Jean-Pierra Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (Pre-Trial Chamber II), *supra* at 51, par. 81.
[320] International Criminal Court, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, *supra* at 114, par. 396.
[321] International Criminal Court, *Prosecutor v. William Samoei Ruto*, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Pre-Trial Chamber II), *supra* at 311, par. 200.
[322] International Criminal Court, *Prosecutor v. Bosco Ntaganda*, Decision on the Prosecutor's Application under Article 58 (Pre-Trial Chamber II), *supra* at 311, par. 26.
[323] Daragh Murray, *Human Rights Obligations…supra* at 248, 73.
[324] International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu*, Judgement (Chamber I), *supra* at 56, par. 580.
[325] International Criminal Court, *Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute (Trial Chamber II), ICC-01/04-01/07, 7 March 2014.
[326] International Criminal Court, *Prosecutor v. William Samoei Ruto*, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Pre-Trial Chamber II), *supra* at 311.
[327] International Criminal Court, *Prosecutor v. Bosco Ntaganda*, Decision on the Prosecutor's Application under Article 58 (Pre-Trial Chamber II), *supra* at 311.

*Chui*.[328] The territorial control element must, therefore, be considered as non-essential in determining the organisational capacity of NSAGs. Considering that the *Ntaganda* test rely on elements of actual capacity, the formal requirement of territorial control does not seem appropriate, particularly as it cannot be considered an intrinsic capacity of NSAGs.[329]

### *2.B.2. Legal basis for the application of international law to NSAGs*

Already having established that NSAGs can be subjected by international law, it is important to establish under which legal basis this status is based on. While today it is widely accepted that NSAGs are bound by IHL,[330] the reason behind this is still unclear, and this state of affairs is usually accepted without a great deal of reflection, which is a consequence of the lack of research on the subject.[331] From the different categorisations present in the scholarship, it is possible to identify five main theories that attempt to explain how are NSAGs bound: by being third parties to the GCs and APII; via domestic legislation; through its members being bound by directly by international law; by exerting effective control over part of a territory, and through CIL.[332]

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[328] International Criminal Court, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, *supra* at 114.
[329] Daragh Murray, *Human Rights Obligations…supra* at 248, 75.
[330] International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgement of 27 June 1986 (Nicaragua v. United States of America), par. 218.
[331] A few notable exceptions are, Antonio Cassese, 'The Status of Rebels…' *supra* at 273; Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55(2) *International and Comparative Law Quarterly*; Jann Kleffner, 'The applicability of international humanitarian law to organized armed groups' (2011) 93(882) *International Review of the Red Cross*; Daragh Murray, *Human Rights Obligations…supra* at 248, and 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2014) 20(1) *Journal of Conflict and Security Law*; and Katharine Fortin, *The Accountability of Armed… supra* at 248.
[332] Katharine Fortin, *ibid.*, 178.

Third party consent:

The idea that NSAGs are bound by IHL as third parties was an early prominent theory,[333] and dictated that, since these groups are non-state entities, the rules in the VCLT relating to third parties do not apply in its narrow definition. As a result, CIL on third parties should be applied instead.[334] According to this theory, this use of CIL could be considered as broadly analogous to the rules contained in articles 35 to 38 of VCLT. Article 35 of the Convention is the most relevant of these provisions, since it determines that *"An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing"*.[335] Following this logic and applying it to NSAGs, it is possible to conclude that these groups are bound by treaty law whenever the contracting parties intended to do so, and when these NSAGs accept this obligations in writing.[336]

Although, an analysis of the *travaux préparatoires* of the GCs and APII clearly demonstrate that drafting states intended to make CA3 and APII binding documents on NSAGs, it is much harder to satisfy the second element of this theory, namely the NSAG's consent.[337] Unilateral declarations from NSAGs recognising their obligations under IHL are common, but the ones covering the whole list of obligations contained in CA3 are rare, and even rarer are the ones including APII obligations.[338] Additionally, it has been a corollary of international law since the International Military Tribunal at Nuremberg that all members of society are bound by IHL, with or without

[333] Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 377-379.
[334] Antonio Cassese, 'The Status of Rebels…' *supra* at 273, 423.
[335] Article 35, Vienna Convention on the Law of Treaties of 23 May 1969.
[336] Katharine Fortin, *The Accountability of Armed… supra* at 248, 180.
[337] *ibid.*, 184.
[338] Sandesh Sivakumaran, *"The Law of Non-International…"*, *supra* at 65, pp. 113-126.

consultation or consent, and as such, there should be no different in relation to NSAGs.[339] Finally, by allowing NSAGs to decide to declare themselves bound by IHL, the third party theory opens the possibility to these groups to become unaffected by their eventual individual criminal responsibility, a power that not even states, possess.[340]

Domestic implementation:

The second approach to the problem, the idea that NSAGs are bound as a result of domestic implementation of treaty law, is perhaps the most straightforward. It provides a domestic law solution and simplifies the problem brought by the complexity of the international legal order, while avoiding granting ILP to these organisations.[341] In addition to that, by making NSAGs only indirectly bound by international law, this theory avoids the problematic situation in which a domestic entity is directly bound by international law without its explicit consent.[342] Nevertheless, this theory transforms the issue of whether these groups are bound by international law into a judgement of factors external to them, which could oftentimes prevent its application.[343] A particular concern regards the steps taken by the parent state to make the GCs and their APs binding in the domestic legal system. In addition to that, in many legal systems, treaty law is not considered to be binding unless it is incorporated into domestic legislation or recognised as a self-executing norm.[344] Examples of such states are the United Kingdom,[345] the United States of

[339] Katharine Fortin, *The Accountability of Armed… supra* at 248, 184.
[340] Sandesh Sivakumaran, 'Binding Armed Opposition Groups', *supra* at 331, 278.
[341] Antonio Cassese, 'The Status of Rebels…' *supra* at 273, 416.
[342] Katharine Fortin, *The Accountability of Armed… supra* at 248, 186.
[343] *ibid.*
[344] Malcom Shaw, *International Law supra* at 268, 150, 166.
[345] *ibid.*, 152.

America,[346] and the greater part of the Commonwealth states.[347] The theory is also flawed in the sense that it ignores the developments from ICL tribunals from the end of the Second World War, to which IHL binds all its addressees directly and without the need for domestic implementation.[348]

Prescriptive or legislative jurisdiction:

Another theory that attempts to provide a legal basis for the application of international law to NSAGs is the legislative or prescriptive jurisdiction theory. This theory proposes that NSAGs are bound by IHL as a result of the GCs and APII, creating direct obligations upon the individual members of these groups.[349] Prescriptive jurisdiction is based on the idea that IHL is an exception to the principle that treaties only create direct rights and obligations for individuals in states that have a monist legal order, or in cases in which these treaties are considered to be self-executing. This theory advances that international treaty law has the power to create direct rights and obligations for individuals whenever this was the intention of the treaty's drafters.[350] This idea is based on the Permanent Court of Justice's *Danzig* advisory opinion,[351] and it is supported by most of the scholarship.[352]

It is submitted by Katherine Fortin that, even though this theory provides a sensible legal basis for the application of international law to NSAGs, the idea that these groups are bound by international law through their members is a major flaw. The author points out that the strong correlation this theory creates between the

[346] *ibid.*, 162-163.
[347] *ibid.*, 172.
[348] Katharine Fortin, *The Accountability of Armed… supra* at 248, 186-187.
[349] Daragh Murray, *Human Rights Obligations…supra* at 248, 101.
[350] Katharine Fortin, *The Accountability of Armed… supra* at 248, 187-188.
[351] Permanent Court of Justice, *'Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials Who Have Passed into the Polish Service, Against the Polish Railways Administration)'*, Advisory Opinion no. 15 of 3 March 1928 (*Danzig* advisory opinion).
[352] Daragh Murray, *Human Rights Obligations…supra* at 248,106.

organisation and its members is inaccurate, as their obligations are not the same.[353] Provisions such as the obligations relating to persons whose liberty has been deprived,[354] or the obligations relating to penal prosecutions and fair trial,[355] for example, are not the same for individuals and the organisation they are part of. Furthermore, Fortin suggests that the prescriptive jurisdiction theory in its basic form does not consider the fact that individuals and organisation stray progressively apart as the organisation becomes more established. With complex organisational structures, disciplinary codes and bureaucratic procedures, relationship between members and their groups becomes gradually impersonal.[356]

As a solution to these problems, the author proposes the application of an extended legislative jurisdiction theory. The idea that fundaments this approach is that, during the drafting conferences of the APs, the ICRC stated that the draft APII was based on the same principles of CA3. This means that obligations accepted by state parties to this then-to-be Protocol would bind not only the state, but all the established and constituent authorities, and private individuals on its territory as well. While this established authority could be understood to be a state's government, the *travaux préparatoires* point to a broader definition, including both the government and NSAGs under the expression.[357] In this sense, the direct attribution of responsibilities to these NSAGs would be nothing but an extension of the principle set by the *Danzig* advisory opinion, and in a sense a natural development of the concept.[358] Fortin's idea seems to be supported by some provisions in the APs, such as article 6(5) of

[353] Katharine Fortin, *The Accountability of Armed… supra* at 248, 192-195.
[354] Article 5(1)(b), (2)(a) and (b), Additional Protocol II.
[355] Article 6, Additional Protocol II.
[356] Katharine Fortin, *The Accountability of Armed… supra* at 248, 192-195.
[357] *ibid.*, 196-197. Federal Political Department of Switzerland, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974-1977) – Volume VIII* (Federal Political Department 1978), 239.
[358] Katharine Fortin, *The Accountability of Armed… supra* at 248, 197-198.

APII, that addresses amnesties at the end of the conflict, and states that: *"*[a]*t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."*[359] Even though this theory is based on relatively slim fundaments, its logic is undeniable, particularly taking into account the evolving nature of international law and its theories. Moreover, the adoption of the extended legislative jurisdiction theory provides a more appropriate reasoning for the imposition of certain obligations to NSAGs themselves, still without the risk of legitimisation, since it provides a suitable explanation for an already established reality.

*De facto* control theory:

The theory that NSAGs are bound by exerting effective control over part of a territory, also known as the *de facto* control theory, provides an alternative to the situations in which these groups do not acquire ILP from the incidence of treaty law or CIL.[360] The *de facto* control theory applies international law to NSAGs on the basis of their exercise of exclusive control over a certain territory.[361] The main factor for the application of this theory is the established territorial control by a NSAGs in an area beyond the reach and the *de iure* authority of the state, creating a legal vacuum.[362] These entities are regarded as independent, and exist in parallel to

[359] Article 6(5), Additional Protocol II.
[360] Daragh Murray, *Human Rights Obligations…supra* at 248, 120-121.
[361] Sandesh Sivakumaran, 'Binding Armed Opposition Groups', *supra* at 331, 379; Jann Kleffner, 'The applicability of international…' *supra* at 331, 452; and Daragh Murray, *Human Rights Obligations…supra* at 248, 121.
[362] Daragh Murray, *Human Rights Obligations… ibid.*

states, exercising effective sovereignty.[363] Situations such as these may arise during NIACs, but their incidence is not exclusive to this context, being also applied outside of situations of conflict.[364] Such entities, by being addressed by the *de facto* control theory would fulfil the requirement of actual possession of international rights and obligations, and consequently be awarded ILP. They are, nevertheless, considered provisional subjects of international law with restricted and subject-specific competence, as their unstable situation may cause them to eventually lose exclusive control.[365]

It is submitted that, despite the traditionally accepted threshold for this theory being high, requiring exclusive control of territory and some form of administration, the justifications underpinning the extension of international regulation to *de facto* entities is still quite helpful. Under appropriate conditions, these factors could be relevant in relation to NSAGs that fall below this threshold, the application of international law being dependent on the existence of a legal vacuum.[366] This idea is reinforced if considering the consistent refusal of states to accept the responsibility for acts committed by opposition movements, with tools such as the principle of non-responsibility *vis-à-vis* the acts of NSAGs. Not only that, but the fact that all acts of a successful insurrectionary movement are considered retroactively acts of state, demonstrates that the law of state responsibility accepts that international obligations can be directly imposed to NSAGs existing below the theory's threshold.[367]

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[363] Liesbeth Zegveld, *Accountability of Armed Opposition… supra* at 56, 15.
[364] Michael Schoiswohl, '*De Facto* regimes and Human Rights Obligations: The Twilight Zone of Public International Law' (2001) 6 *Austrian Review of International and European Law*, 50.
[365] Daragh Murray, *Human Rights Obligations…supra* at 248, 121-122.
[366] *ibid.*, 131.
[367] *ibid.*, 131-132.

Accordingly, it can be concluded that NSAGs below such threshold may still be bound by international obligations, as consequence of the necessity-based application of the theory. However, these groups should still be able to fulfil the two criteria for ILP, i.e., having the capacity to possess international obligations and exist independently.[368]

Customary international law:

The final theory of how NSAGs are bound by international law finds its explanation in CIL. There are two approaches to this theory, both of which bear a close similarity to the prescriptive jurisdiction approach. The first claims that a NSAG is bound by CIL because its members are bound by CIL, while the second proposes that these groups are subjected to CIL as a result of their status as independent subjects of international law.[369] The second branch of this theory is certainly more appropriate, as it addresses NSAGs directly, without relying on their members, and by recognising that the group possesses greater reach, power and capabilities than its individual members. As with the *de facto* control theory, this model's reasoning is also based on the need to acknowledge the compromised capacity of states during NIACs.[370]

On the other hand, the CIL theory falls prey to some sensible problems. The first problem is that this theory does not recognise the differences between NSAGs and states. CIL is considered a fixed body of international law that applies equally to all new subjects of international law from the first moment of their existence.[371] This assertion does not take into account the limited, subject-specific, competence

[368] *ibid.,* 133.
[369] Katharine Fortin, *The Accountability of Armed… supra* at 248, 204.
[370] *ibid.*
[371] Sandesh Sivakumaran, 'Binding Armed Opposition Groups', *supra* at 331, 373.

NSAGs possess, in comparison to the full spectrum of ILP enjoyed by states.[372] Secondly, the determination that a NSAGs are bound by CIL is a rather circular argument. It is established in the international legal doctrine that a subject of international law is an entity capable of holding rights and obligations under international law.[373] If we are to follow this logic when considering NSAGs, we have a redundant argument, appropriately demonstrated by Jan Kleffner: *"organized armed groups* [are] *thus regarded as international legal persons because they possess rights and obligations under IHL, whereas they are seen to possess these rights and obligations because they are international legal persons.*[374] The flaw in this logic resides on the fact that by accepting the application of international law to NSAGs from the moment they become legal entities under international law, a retroactive argument is created, *i.e.* that NSAGs must have been in possession of ILP before the recognition of this status as they were subjected to IHL from the start, which does not quite work.

From the theories demonstrated about the legal basis to apply international law to NSAGs, it becomes evident that none of the approaches is sufficiently complete in order to address the problem. Therefore, the best solution to better capture the whole gamut of situations in which it may be necessary to apply international law to NSAGs should be to adopt a combined approach. From the available tools for the imposition of international obligations to NSAGs, the prescriptive jurisdiction theory in its extended form, the *de facto* control theory and the CIL theory, focussing on its direct application to NSAGs appear to be the most useful.

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[372] Katharine Fortin, *The Accountability of Armed… supra* at 248, 204-205.
[373] James Crawford, *The Creation of States in International Law* (2nd edn Clarendon Press 2006), 28.
[374] Jann Kleffner, 'The applicability of international…' *supra* at 331, 456.

*2.B.3. Applying IHRL to NSAGs via* Drittwirkung *and horizontal effect theories*

After establishing the means by which IHRL may be applicable to NSAGs, a further issue must be addressed before determining how this application can in fact occur: the challenge of the *ratione personae* restriction that is considered to be inherent to this body of law.

It has been established that IHRL treaties regulate exclusively the relationship between states and individuals subjected to their jurisdiction.[375] While originally this paradigm was accurate and effective, the present reality has challenged this framework, with NSAGs exerting considerable influence over populations, in the absence of state authority.[376] Under this new reality, it does not seem very effective to determine the protection of IHRL based on the authority that is violating them. As discussed earlier, the foundation of IHRL is the dignity of the human person, which demonstrate clearly the inadequacy of this proposition.[377]

In order to ensure the proper application of IHRL it is not only appropriate, but also necessary, that this legal framework regulate the relationship between individuals and the authority they are subjected to, including NSAGs. Denying this conclusion is not only the denial of individual rights, but also the acceptance of a legal vacuum.[378] This position has been increasingly popular,[379] with a number UN bodies[380] as well

[375] Nigel Simon Rodley, 'Can Armed Opposition Groups…' *supra* at 246, 308.
[376] Celia Wells and Juanita Elias, 'Catching the Conscience of the King: Corporate Players on the International Stage' *in* Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005), 147.
[377] Andrew Clapham, *Human Rights Obligations… supra* at 285, 533-548.
[378] Daragh Murray, *Human Rights Obligations…supra* at 248, 159.
[379] Andrew Clapham, *Human Rights Obligations… supra* at 285, 533-548.
[380] For instance, United Nations Human Rights Council, *Report of the International Commission… Libyan Arab Jamahiriya supra* at 66, par. 72; and *Report of the Independent International Commission… Syrian Arab Republic*, A/HRC/22/59, 5 February 2013.

as states[381] having endorsed it. Nevertheless, the legal basis of application of this body of law to NSAGs has not been clearly established.

Some commentators have suggested that certain IHRL treaties directly bind NSAGs,[382] including the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict,[383] the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention),[384] as well as the International Convention for the Protection of All Persons from Enforced Disappearance.[385] Despite the undoubtable contribution of these documents, their application is still limited in relevance and scope for the greatest part of individuals affected by NSAGs. These provisions do not address the legal vacuum and do not ensure the protection of individuals as is essential for IHRL.[386] Therefore, it must be established whether the broader provisions of IHRL can apply to NSAGs.

Two theories are relevant to this discussion. The first is the *Drittwirkung* theory, which establishes that provisions apply not only between the state and the individual but also in the legal relations between private parties.[387] The second, the horizontal effect theory, that defends that constitutional rights regulate the conduct of government actors in their dealings with private individuals, as well as between

[381] Sandesh Sivakumaran, *The Law of Non-International… supra* at 2, 97.
[382] Andrew Clapham, 'Focusing on Armed Non-State Actors' *in* Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014), 790-792; and *Human Rights Obligations…*, *supra* at 285, 75.
[383] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. 25 May 2000.
[384] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). 23 October 2009.
[385] International Convention for the Protection of All Persons from Enforced Disappearance. 20 December 2006.
[386] Daragh Murray, *Human Rights Obligations…supra* at 248, 162.
[387] Nicolas Jagers, *Corporate Human Rights Obligations: in Search of Accountability* (Instersentia 2002), 37.

private individuals.[388] These two provide a legal basis for the relationship between states and individuals as well as between individuals themselves.[389] Nonetheless, this theories have their limitations. Both the *Drittwirkung* and the horizontal effect theories apply to traditional and normally functioning national structures, i.e., with the government at the top of the hierarchy. They also apply to private persons possessing IHRL obligations *vis-à-vis* other private persons due to the state regulations. Since that in the context of NSAGs, the mere existence of these organisations vested with ILP in a territory presupposes the displacement of state authority, there is no state to position itself at the top of the legal hierarchy. In these situations, the NSAG is the entity in position of authority in relation to the population, which influences neither the *Drittwirkung* nor the horizontal effect of IHRL. However, this does bear consequences to the vertical effect of these rights, as the NSAG is in a position of vertical authority and the traditional authority structure is maintained.[390]

The drafters of IHRL treaties such as the ICCPR and the International Covenant on Economic, Social and Cultural rights had the express objective of binding states, and consequently regulating the relationship between these entities and the individuals under their jurisdiction.[391] At a first glance, this choice would point out to the restriction on the application of IHRL *ratione personae* to states. However, taking into consideration the period in which these documents were drafted, when states were the only dominant force in international law, it is understandable that adjustments in this conception have occurred. In the following years, there were significant changes

[388] Stephen Gardbaum, 'The Horizontal Effect of Constitutional Rights' (2003-2004) 102 *Michigan Law Review*, 388.
[389] Andrew Clapham, '"Drittwirkung" of the Convention' *in* Ronald St. J. MacDonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993).
[390] Daragh Murray, *Human Rights Obligations…supra* at 248, 163-164.
[391] Nigel Simon Rodley, 'Can Armed Opposition Groups…' *supra* at 246, 308.

in the *status quo* of the international community. These changes have therefore demonstrated the need for adaptations in the interpretation of treaties, an exercise that has been acknowledged in international jurisprudence.[392] In the *Reparations* advisory opinion, for instance, the ICJ found that *"the development of international law has been influenced by the requirements of international life"*,[393] and found that, despite not being explicitly specified in its founding document, in order to be able to achieve its goals, it is indispensable to attribute ILP to the UN.[394] The same evolutionary interpretation principle was applied on the *Democratic Republic of Congo v. Uganda* case at the Tribunal.[395]

In this sense, it is not only permissible, but necessary that IHRL treaties are interpreted in this novel manner. Moreover, the importance attributed to protecting individuals' rights and the fact that IHRL obligations are now seen as *erga omnes*, only add to the importance of this approach.[396] Taking that into consideration, care must also be taken not to stretch interpretations beyond their limits. This should not be a concern though, as this interpretation does not alter the fundamental objective of such treaties. Since IHRL is applied to solve legal vacuums and binds entities at the top of the vertical legal hierarchy, it is only logical that in order to heighten the effectiveness of this protection, the *de facto* authority of NSAGs is recognised and regulated. In this sense, IHRL treaties are would still be applied in the manner in which they were envisioned by their original drafters, and at the same time, working

[392] Daragh Murray, *Human Rights Obligations…supra* at 248, 164.
[393] International Court of Justice, Reparations advisory opinion, *supra* at 256, par. 178.
[394] *ibid.*
[395] International Court of Justice, *Democratic Republic of Congo v. Uganda*, *supra* at 202.
[396] Daragh Murray, *Human Rights Obligations…supra* at 248, 166.

to improve the object and purpose of such regulations, which is the protection of the individual.[397]

### 2.B.3.a. Gradated application of IHRL obligations to NSAGs

Having determined the way NSAGs may be bound by IHRL, it is necessary to establish the content of these obligations. When analysing this issue, it is important to have in mind that these obligations must strike the balance between answering the needs of the population under NSAGs influence and at the same time be realistic, in the sense that they must be realistically achievable, considering NSAGs almost universally rely on less resources and personnel than states. By attempting to impose a binary approach, in which NSAGs must either conform to every single IHRL obligation, including those that are hardly respected by states themselves, or have no obligations at all is to undermine the respect for IHRL, and at the same time to ignore the needs of the population governed by such groups in the name of legal formalism.

The determination of the content of NSAGs' IHRL obligations is subjected to a situation analogous to states' extraterritorial IHRL obligations. Similarly to these situations, the attribution of IHRL obligations to NSAGs arise only in exceptional circumstances, in response to the reality of the control exercised, and in an area typically subjected to the jurisdiction of a sovereign state.[398] Effective territorial control in this case, can be established either via military control[399] or via other factors, such as military, political or economic support.[400] Considering the

[397] *ibid.*, 166-169.
[398] *ibid.*, 173.
[399] European Court of Human Rights, *Loizidou v. Tukey*, App. No. 15312/89, 18 December 1996, par. 56.
[400] European Court of Human Rights, *Catan and others v. Moldova and Russia*, App. No. 43370/04, 8252/05 and 18484/6, 19 October 2012, par. 107.

exceptional circumstances under which extraterritorial obligations arise, these obligations are not considered to be equivalent to the obligations states' possess in their own territory. They have a specific content of individuals obligations that must be determined.[401] states are not capable of protecting all rights in any given situation, but they are under the obligation to protect those rights that are under their control.[402]

This context-dependent approach to NSAGs' obligations is facilitated by states' continuing obligations in respect to the entirety of its territory, including the areas that are under *de facto* control of non-state entities. Therefore, while NSAGs may be responsible for a limited number of rights in a particular situation, the state still possesses obligations in relation to its territory in order to avoid a lack of protection of the remaining rights.[403] The consequence is a division of IHRL obligations between the state and the NSAG.[404]

After establishing the approach to the obligations imposed on NSAGs, it is important to determine the content of such obligations. The appropriate framework to be adopted seems to be the "respect, protect, fulfil", proposed by a series of authors.[405] This framework was developed in light of the progressive realisation clause, associated with economic, social and cultural rights, being useful in the sense that it acknowledges the capacity constraints regarding the resource-dependent realisation

[401] Daragh Murray, *Human Rights Obligations…supra* at 248, 175.
[402] Noam Lubell, 'Human rights obligations in military occupation' (2012) 94(885) *International Review of the Red Cross*, 329-334.
[403] Daragh Murray, *Human Rights Obligations…supra* at 248, 179.
[404] Andrew Clapham, 'Non-State Actors' *in* David Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press 2010), 563.
[405] Andrew Clapham, *Human Rights Obligations… supra* at 285, 230; Nicolas Jagers, *Corporate Human Rights… supra* at 387, 78; Noam Lubell, *Extraterritorial Use of Force… supra* at 91, 228-231; Daragh Murray, *Human Rights Obligations…supra* at 248, 181-197.

of IHRL. Nevertheless, it is generally understood that this framework is not exclusive of economic, social and cultural rights.[406]

The "respect, protect, fulfil" framework imposes three interdependent levels of obligation.[407] The obligation to respect is a negative obligation, determining the authority to refrain from acting in violation of IHRL. The obligation to protect is a positive obligation that requires the authority to protect individuals against human rights violations from third parties. While this obligation usually includes the enactment of legislation as a preventive obligation, it still requires action and remedial obligations in relation to the protecting authority. Finally, the obligation to fulfil is also a positive obligation, requiring measures to be undertaken to secure the realisation of IHRL standards. The obligation to fulfil is divided into three categories, facilitate, provide, and promote. The obligation to facilitate requires positive measures to assist individuals and communities to enjoy the right in question.[408] The obligation to provide requires an authority to directly ensure the provision of a right when individuals or a group are unable, for reasons beyond their control, to realise the right themselves.[409] And lastly, the obligation to promote requires the provision of appropriate education with respect to the right in question.[410] It is important to highlight that these obligations are complementary and simultaneous, thus, for example, in the case of the prohibition of torture, the obligation to respect requires the authority to refrain from engaging in acts of torture, while the obligation to fulfil

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[406] Daragh Murray, *Human Rights Obligations… ibid.*, 181.
[407] Frederic Megret, 'Nature of Obligations' *in* David Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press 2010), 130-131.
[408] Committee on Economic, Social and Cultural Rights, *General Comment 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)"*, E/C.12/2002/11, 20 January 2003, par. 25.
[409] Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, E/C.12/2000/4, 11 August 2000, par. 37.
[410] Daragh Murray, *Human Rights Obligations…supra* at 248, 181-182.

entails the enactment of appropriate legislation and the training of state agents to give effect to the right.[411]

This framework is not applied in the traditional way though, but instead it is used to provide a structured application of gradated obligations to NSAGs, in view of these groups' particular realities, as well as the level of displacement faced by the governmental authorities. As a starting point, all NSAGs are subjected to the obligation to respect, as they are negative obligations. With the progressive displacement of state authority, they become bound by the obligation to fulfil. Finally, when the NSAG achieves total control over a territory, it becomes bound by the obligation to protect, which includes duties to maintain the rule of law and the administration of justice.[412]

Obligation to respect:

The obligation to respect is a negative obligation that determines that no action must be taken to undermine individuals' rights under IHRL. Since this obligation merely requires that the authority refrains from acting, its fulfilment requires only the entity's capacity to control its own agents, which is an essential criterion for the recognition of ILP. In this sense, all international persons should be capable of fulfilling this obligation, and as such, it must be regarded as binding on all international legal persons at all times.[413] While this obligation precludes actions that will interfere with individuals' rights, the obligation may also require that NSAGs allow government officials, such as teachers or medical staff, to continue providing their services, or to refrain from interfering with humanitarian activities.

[411] *ibid.*, 182.
[412] *ibid.*, 183.
[413] Chris Jochnick, 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights' (1999) 21(1) *Human Rights Quarterly*, 184.

Obligation to fulfil:

The obligation to fulfil is intended to achieve the full realisation of the human right in question, and to ensure it is effective in reality.[414] The obligation to fulfil requires positive action, including *"appropriate legislative, administrative, budgetary, judicial, promotional and other measures"*,[415] in order to achieve the full realisation of the right. The first step would be the adoption of legislation in order to ensure the implementation of international obligations. The satisfaction of this obligation will therefore require the monitoring of the right in question, and if necessary, positive action.[416]

The obligation to fulfil is divided in three categories: facilitate, provide, and promote. The obligation to facilitate requires that the authority undertake *"positive measures to assist individuals and communities to enjoy the right"*,[417] which may include removing fees that *de facto* prevent access to rights, taking measures to reduce illiteracy or poverty etc.[418] The obligation to provide requires that when individuals or a group of individuals are unable to realise a right themselves for reasons beyond their control, the authority must provide that right directly.[419] A important example is in relation to the right to a fair trial, in which the authority is required to provide access to free-of-charge defence counsel when necessary.[420] The obligation to promote requires the authority to undertake efforts to provide the education necessary for the realisation of

[414] Olivier de Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2010), 465.
[415] Committee on Economic, Social and Cultural Rights, *General Comment No. 14…, supra* at 409, par. 33.
[416] Daragh Murray, *Human Rights Obligations…supra* at 248, 186-187.
[417] Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The Right to Education (Art. 13)*, E/C.12/1999/10, 8 December 1999, par. 47.
[418] Daragh Murray, *Human Rights Obligations…supra* at 248, 187.
[419] Committee on Economic, Social and Cultural Rights, *General Comment No. 14…, supra* at 409, par. 37.
[420] Daragh Murray, *Human Rights Obligations…supra* at 248, 188.

the particular right, such as educating the population in relation to the hygienic use of water in the context of the right to water.[421]

The progression of the obligation to fulfil will most likely take place in the following order: when the NSAG displaces the state's authority to a level in which it is subjected to this obligation, the group will initially be bound by the obligation to facilitate, as the resources required are significantly lower in comparison to the obligation to provide. For example, a group may allow the medical personnel from the ICRC to provide medical treatment to the population in its territory if the group does not possess at first enough medical professionals to care for the population. This may require positive obligations, such as contacting the ICRC, the state or even a third party. With the gradual increase in resources, the NSAG may then be able to comply with the provide aspect of the obligation. Finally, with sufficient resources, the NSAG may engage in the obligation to promote, as this obligation requires ample resources.[422]

Obligation to protect:

The obligation to protect requires that efforts be undertaken to protect against the violation of individuals' rights by third parties, such as other individuals, corporations, or other entities, including NSAGs. The obligation consists in a preventive component involving the establishment of criminal or administrative sanctions, and a remedial component requiring the investigation and the establishment of a

[421] *ibid.*, 189.
[422] *ibid.,* 190.

remedy.[423] It is relevant to add that the obligation to protect is determined on the basis of reasonableness and will vary according to the particular situation.[424]

The elements of this obligation point to the need to be able to maintain public order and the rule of law, as to protect against third parties, a suitable regulation must be adopted, which may include detention and prosecution. Consequently, the obligation will in all probability require that NSAGs be able to enact and/or apply legislation, in order to regulate the activities of the population it controls. It goes without saying that this requirement implies a high level of sophistication. Additionally, the carrying out of detentions and prosecutions are in themselves an element of concern, as these activities may constitute violations of IHRL.[425]

To avoid encouraging violations of IHRL by imposing this obligation to NSAGs incapable of complying with it, it is necessary that the NSAG be in total and exclusive control of the territory and its population. This is even more important considering that the obligation to protect requires a level of intervention in the daily life of the community that can only be achieved by undisturbed control.[426]

## 3. Conclusion

The objective of this chapter is to firstly, unpack and analyse the relationship between IHL, ICL, and IHRL in situations of armed conflict, and following this explanation, to progressively analyse the application of IHRL to NSAGs.

The first part of this chapter was dedicated to the exploration of the interplay between these branches of law. This analysis was carried out due to the importance of clearly defining an approach to situations of apparent normative conflict between,

[423] *ibid.,* 195.
[424] Olivier de Schutter, *International Human Rights supra* at 414, 389.
[425] Daragh Murray, *Human Rights Obligations…supra* at 248, 196-197
[426] *ibid.*, 197.

especially, IHRL and IHL. Subsequently, the variations on the principle of *lex specialis* as applicable to these two frameworks of international law were explored. The conclusion was that the better approach is, instead of adopting a norm displacement method, to adopt a conflict avoidance approach, that uses both areas as interpretive tools to decide on the best applicable norm in a case-by-case basis.

Following this first part, the chapter went on to provide a gradual analysis on how NSAGs are bound by IHRL. The first step to be taken was to determine how a NSAG acquires ILP, which is the basic requisite to be a subject of international law. In this topic, it was suggested that, in order achieve ILP status, the would-be entity must possess an independent existence, which means that it must not be subjected to any hierarchically superior entity, and the capacity to possess rights and obligations under international law. This latter requirement needed further elaboration, as, contrary to the former, it is neither clear or uncontested in the scholarship or jurisprudence. The element considered to demonstrate the capacity of NSAGs to possess rights and obligations under international law was determined to be their organisation, either in or outside a situation of armed conflict. Elements that characterise this organisation include a clearly defined hierarchy, the power to enforce internal discipline, among others.

Once established under which conditions the NSAGs may acquire ILP, it was necessary to establish the legal basis for them to be bound as international legal persons. The five most prominent theories regarding the subject were presented, and it was concluded that, even though they are all individually lacking in some aspect, the most effective theories, when used in tandem, provide decent framework for the imposition of legal obligation to these groups.

Once the ILP and the legal basis for the imposition of international law obligation was determined, the examination turned to the issue of the imposition of IHRL obligations to NSAGs. The first issue to be addressed was the apparent impossibility to impose such obligations due to treaty limitations. A more detained analysis proved that assertion to be wrong, and that in fact, the application of IHRL obligations to NSAGs is an evolution of the interpretation of international law, this conclusion being supported by case-law.

Finally, the chapter went on to describe the content and the scope of IHRL obligations NSAGs may be subjected to. It was established that the framework of respect, protect, fulfil would be the most appropriate, considering its flexibility, its consideration for resources and capacity building, as well as the idea of progressive realisation. All these factors are of utmost importance when discussing obligations of NSAGs. The framework suggested demonstrated a progressive imposition of obligations: from the obligation to respect, negative and enforceable by all the entities capable of enforcing internal disciple, to the obligation to fulfil in its three forms. Finally, NSAGs are entirely responsible for these obligation with the obligation to protect, that requires a high level of organisation and exclusive territorial control to impose public order and the rule of law.

# Chapter 3 – Legal basis for detention

The present section will address the rather contentious issue of the legal basis for detention by non-state armed groups (NSAGs). It is important, though, that before presenting the subject, some methodological considerations are taken into account. Firstly, the decision to address detention before prosecution was adopted considering some instances of detention, such as administrative and security detention, as well as pre-trial detentions for crimes unrelated to an armed conflict. As these situations precede any form of judicial procedure or even administrative review of the detention, the choice of the subjects' order intended to replicate the natural iteration of these events. Secondly, to maintain a clear flow of ideas, the two main topics of the present work, detention and prosecution, were divided between their legal bases and the procedural guarantees involved in each of them. This division is important, to both highlight the distinctions, as well as the overlapping elements of their legal frameworks.

When addressing the legal basis for detention by NSAGs, one must first consider which forms of detentions these organisations carry out on the field. These can be roughly divided between: detention of combatants, including members of paramilitary forces, and armed groups under direct control of a state;[1] detention of fighters and civilians taking direct part in the conflict, including both members of other NSAGs,[2] independent civilians,[3] as well as private military contractors.[4] Additionally, this

[1] Knut Ipsen, 'Combatants and non-combatants' *in* Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (4th edn Oxford University Press 2021), 93-101.
[2] *ibid.*, 627, and more generally, Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (International Committee of the Red Cross 2009).
[3] Knut Ipsen, 'Combatants and non-combatants' *ibid,* 97-98, and Nils Melzer, *Interpretive Guidance on the Notion… ibid*.
[4] For more information regarding the status on private contractors, see Katherine Fallah, 'Corporate actors: the legal status of mercenaries in armed conflict' (2006) 88(863) *International Review of the*

division also comprises the detention of civilians for reasons of security,[5] including for their own safety;[6] the detention of NSAGs' own members for disciplinary reasons and for the violation of rules of International Humanitarian Law (IHL);[7] and the detention of civilians for criminal matters unrelated to an armed conflict.[8] For the purposes of the current research, the expression 'detention' encompasses all of the aforementioned categories, with reference to a particular regime being made only when necessary.

Another crucial preliminary issue is the determination of what constitutes and when does detention begin. Detention can be considered the act of depriving individuals from their liberty, by imposing restrictions on their freedom of movement, or by confining within a bounded or restricted area.[9] The circumstances under which the restriction of liberty is considered to become detention are not a consensus, but it may include being stopped at roadblocks, checkpoints or when searching houses or property.[10] Nevertheless, the better view seem to be the one presented by the

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*Red Cross*; Peter Warren Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell University Press 2003); and Nils Melzer, *Interpretive Guidance on the Notion… supra* at 2, 37-40.

[5] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012), 301-305.

[6] Knut Ipsen, 'Combatants and non-combatants' *supra* at 1, 284. Additionally, despite taking place in the context of a multinational peacekeeping operation, voluntary and security detentions in order to ensure an individual's safety in the context of INTERFET demonstrate some challenges faced by many fighting forces particularly in scenarios of military occupation. See Bruce Oswald, 'The INTERFET Detainee Management Unit in East Timor' (2000) 3 *Yearbook of International Humanitarian Law*.

[7] René Provost, 'Accountability for International Crimes with Insurgent Groups' *in* Morten Bergsmo and SONG Tianying (eds), *Military Self-Interest in Accountability for Core International Crimes* (2nd ed Torkel Opsal Academic EPublisher 2015); Ezequiel Heffes, 'Closing a Protection Gap in IHL: Disciplinary Detentions by Non-State Armed Groups in NIACs' (3 July 2018) *EJIL Talk!*; and Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016), 206-255.

[8] Daragh Murray, *Human Rights Obligations… ibid.*; Jonathan Somer, 'Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict' (2007) 89(867) *International Review of the Red Cross*; Sandesh Sivakumaran, 'Courts of Armed Opposition Groups: Fair Trials or Summary Justice?' (2009) 7 *Journal of International Criminal Law*.

[9] The Copenhagen Process on the Handling of Detainees in International Military Operations: The Copenhagen Process: Principles and Guidelines (Copenhagen Principles), October 2012, The Chairman's Commentary to the Copenhagen Process: Principles and Guidelines, par. 1.1.

[10] *ibid.*, 1.4.

Human Rights Committee in its General Comment 35, which determines that deprivation of liberty is more severe than a simple restriction on a person's liberty of movement. Examples of this form of deprivation includes police custody, remand detention, post-conviction imprisonment, house arrest, administrative detention, involuntary hospitalisation, institutional custody of children, confinement in a restricted area of an airport, as well as involuntary transportation.[11] The General Comment goes on to clarify one important exception, which is the restrictions consequent from military service. In these situations, acts that would amount to deprivation of liberty are not considered to be so if they do not exceed the exigencies of normal military service or the standard of life experienced in the particular armed forces.[12]

An important point that is raised by the Human Rights Council document is that, in order for a situation of deprivation of liberty to exist, there must be an absence of free consent.[13] In this context, individuals presenting themselves to, or being approached by, the relevant authorities in order to be placed under custody, and knowing that they are allowed to leave, cannot be considered to be subjected to deprivation of liberty.[14] Considering this important condition, it is necessary to reflect upon the status of detentions carried out with the alleged intent of protecting the detainee. The fact that the person presented themself to the detaining authorities does not change the nature of the act, the defining element being the possibility of leaving custody as a soon the individual manifests the wish to do so. In case the individual is allowed to leave as soon as the threat, as perceived by them, ceases,

[11] United Nations Human Rights Council, *General Comment no. 35, Article 9 (Liberty and security of person,* CCPR/C/GC/35, 16 December 2014, par. 5.
[12] *ibid.*
[13] *ibid.,* par. 6.
[14] *ibid.*

the situation cannot be considered as one of detention. A Similar situation, mentioned in the General Comment, is the case of a person that voluntarily presents themself to a police station to participate in an investigation.[15] On the other hand, if the individual, once under the custody of the state or the NSAG, is not allowed to leave until the detaining authorities determine that the risk to their life has ceased to exist, this person is in fact deprived of their liberty. In relation to the former situation, although not considered to be detained, the individual should still be entitled to be treated humanely and to have their dignity respected.[16]

### 1. Is there a legal basis for NSAG detention under IHL of NIAC?

Despite being a common and widespread practice worldwide,[17] the idea of the existence of a legal basis for the detentions carried out by NSAGs are, predictably, confronted with fierce resistance from states, as well as the majority of the academia. The contentiousness of the topic stems, in great part, from the lack of an explicit authorisation for this conduct in the two main provisions applicable to NSAGs in these situations. Neither Common Article 3 (CA3), which determines the existence of low threshold NIACs and is applicable to all categories of NIAC, nor Additional Protocol II (APII), that regulates higher threshold armed conflicts, provide a clear answer. The wording found in CA3,

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[15] *ibid.*

[16] Copenhagen Principles, *supra* at 9, par. 3.1.

[17] As this thesis is about to be submitted, Hamas in the Gaza Strip has launched a series of attacks against Israel, and as of now, the number of detained civilians and IDF soldier is unknown but estimated to be around 100. See n/a, 'What we know about Israeli hostages taken by Hamas' (*BBC News*, 08 October 2023) <https://www.bbc.com/news/world-middle-east-67044255> accessed 08 October 2023. Other recent examples include Khalid Umar Malik, 'Resistance fighters arrest alleged corrupt cops in Tedim' (*Malaysia Sun*, 06 October 2023) <https://www.malaysiasun.com/news/273990563/resistance-fighters-arrest-alleged-corrupt-cops-in-tedim> accessed 08 October 2023; n/a, 'Pro-Turkish Syria rebels arrest Islamic State group leader' (*The New Arab*, 08 August 2023) <https://www.newarab.com/news/pro-turkish-syria-rebels-arrest-islamic-state-group-leader> accessed 08 October 2023; n/a, 'Sudan: RSF rebels detain Egyptian soldiers as they take airport during coup' (*Middle East Monitor*, 17 April 2023) <https://www.middleeastmonitor.com/20230417-sudan-rsf-rebels-detain-egyptian-soldiers-as-they-take-airport-during-coup/> accessed 08 October 2023.

> *In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:*
>
> *(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.*
>
> *To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:*
>
> (…)
>
> *(b) taking of hostages;*
>
> (…)[18]

Appears to merely determine the application of procedural safeguards to all those under detention, providing only the explicit prohibition on the taking of hostages. This prohibition was reproduced in APII. Building up on the regulation introduced by CA3, the Protocol developed the safeguard framework, but still without signalling any form of explicit authorisation or prohibition. APII states that, *'In addition to the provisions of Article 4* [on fundamental guarantees]*, the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained:* (…)*'.*[19]

This lack of clarity has allowed for a wide range of interpretations claiming to represent the *ratio legis* of the Conventions and their Protocols, as well as non-legal arguments, oftentimes based on false premises or outdated interpretations of international law. Both the political claims against the existence of an authority to

[18] Common Article 3 to the Geneva Conventions of 1949 (Common Article 3).
[19] Article 5(1), Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II). Geneva, 8 June 1977.

detain by NSAGs, and a series of commonly used legal arguments, in favour and against the existence of such authorisation, will be explored below.

### *1.A. Against the existence of an authority to detain: the legitimisation argument*

One of the most persistent arguments against the existence of a right to detain by NSAGs, and one that is *quasi* political, is the erroneous notion that granting any sort of authority to these actors would be the same as legitimising them in the eyes of international law. This view, in which states are the only subjects of international law, has always permeated debates involving non-state actors. A notorious example is the drafting of most of the Geneva law, when any reference to NSAG was prefaced by clarifications that, despite being included in the conventions, such entities did not possess rights and legal personality. This standing lead to the famous inclusion of the passage *'The application of the preceding provisions shall not affect the legal status of the Parties to the conflict'* to CA3,[20] without which, the article would have never been adopted.[21] This concern is particularly demonstrated by the Nigerian explanation of vote on the then-article 10bis of APII. The Nigerian state representative pointed out that the inclusion of reprisals in NIACs would allow rebel groups to

> *Deliberately commit acts to which the normal reaction would be in the nature of reprisals but because of a prohibitory article such as this, Governments would feel bound to fold their arms while dissident groups go on a rampage killing and maiming innocent civilians and burning dwellings and food crops'*.[22]

[20] Common Article 3.
[21] Jean Pictet (ed), *The Geneva Conventions of 12 August 1949 – Commentary – vol. I* (ICRC 1958), 60-61.
[22] Federal Political Department of Switzerland, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974-1977) – Volume VII* (Federal Political Department 1978), 122.

Despite the move towards the recognition of international personality of non-state actors, the idea that the acquisition of rights and obligations is equal to legitimisation, even when not a consequence of the recognition of legal personality, still endures. This is particularly evident, for example, in subparagraph 1(6) of the Convention on Certain Conventional Weapons.[23]

The understanding that providing a legal basis for detention, and consequently, allowing NSAGs to be subjects of international rights and obligations, would lead to their legitimisation is based on a false equivalence. The two figures – legitimacy and international legal personality – are different, and not necessarily linked. While legitimacy is a political element, international legal personality is a strictly legal phenomenon.[24] Examples of non-state actors being vested with both national and international political legitimacy without possessing any form of international legal personality such as the African National Congress of South Africa and the Palestine Liberation Organisation are abundant. On the other side of the coin, entities in possession of full international legal personality but lacking legitimacy, as were the cases of the apartheid regimes in South Africa and Rhodesia,[25] clearly demonstrate the flaw in this reasoning.

[23] Article 1(6), Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects of 1980 with Amendments and Protocols Adopted Through 28 November 2003: The application of the provisions of this Convention and its annexed Protocols to parties to a conflict which are not High Contracting Parties that have accepted this Convention or its annexed Protocols, shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.

[24] Daragh Murray, *Human Rights Obligations…supra* at 7, 35-36; Jann Kleffner, 'The applicability of international humanitarian law to organised armed groups' (2011) 93(882) *International Review of the Red Cross*, 455.

[25] Daragh Murray, *Human Rights Obligations… ibid*., 36.

### *1.B. Implicit authorisation under IHL*

While the means by which NSAGs can be bound by international law have been addressed on the previous chapter,[26] the debate on whether an authority for insurgent detention can be found in IHL of NIACs is one of the main sticking points in the area. Consequently, this has been the subject of a great deal of attention by academics.[27]

As it was previously demonstrated, it is widely accepted that NSAGs are bound by both CA3[28] and the APII[29] to the Geneva Conventions (GCs). A quick perusal of these instruments allows for the verification that they contain no explicit authorisation for detentions, neither by states nor by NSAGs. While CA3 merely asserts the rights of every individual not taking active part in hostilities to be treated humanely, among them, those deprived of their liberty, APII addresses individuals who have been deprived of their liberty, and describing minimal standards of detention.[30] From this information, it is evident that the drafters of the GCs and Protocols made an effort to regulate detention, but did not provide a legal basis. Consequently, a series of theories have emerged in order to fill in this supposed gap, all of them taking into account an implicit legal basis for detention in NIACs.

#### *1.B.1. Analogy to the law of International Armed Conflict*

Considering the proximity between the regime regulating detention in NIAC and the much more developed regulating internment in IAC, it seems tempting to transpose

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[26] See Chapter 2, 2.B.2 – Legal basis for the application of international law to non-state armed groups.
[27] For instance, with varying degrees of emphasis, Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict* (Oxford University Press 2016); Andrew Clapham, 'Detention by Armed Groups in International Law' (2017) 93(1) *International Legal Studies*; Els Debuf, *Captured in War: Lawful Internment in Armed Conflict* (Editions Pedone/Hart 2013); Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002).
[28] Common Article 3.
[29] Additional Protocol II.
[30] *ibid.*, Article 5.

norms from the latter to the former by means of analogy. This practice has been consistently used by the United States government in order to provide a legal basis for detention of members of NSAGs that do not rely on International Human Rights Law (IHRL).[31] By applying the concept of co-belligerency to any NSAG supporting Al-Qaeda, the United States government has claimed the right to target its members. By the same logic, drawing from the concept of civilians accompanying the armed forces from the Third Geneva Convention (GCIII), detention rights were expanded to individuals that are not members of Al-Qaeda but support the organisation in some way.[32] Despite the apparent suitability of this solution in solving the absence of an explicit authorisation, a detailed analysis shows that these comparisons are hardly appropriate. In the same manner that NSAGs cannot be equated to belligerent states, these entities do not possess the full capacity to comply with analogised rules in their entirety, such as the provisions for prisoners-of-war found in GCIII or security detention of the Fourth Geneva Convention (GCIV).

Additionally, when trying to locate an authorisation to detain, the existence of a legal basis in which this authorisation rests must be found. While the United States Supreme Court has generally accepted this interpretative method without much questioning, particularly in consideration of detention of 'co-belligerents' to Al-Qaeda,[33] there have been significant attempts from the scholarship to justify the use of analogy. Academics such as Curtis Bradley, Jack Goldsmith, Marty Lederman and Steve Vladeck have claimed that neutral individuals that assist or support other

[31] Kevin Jon Heller, 'The use and abuse of analogy in IHL' *in* Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge University Press 2016), 233.
[32] *ibid.*
[33] For example, in United States Department of Justice, *Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay* (13 March 2009); and United Nations District Court for the District of Columbia, *Hamlily v. Obama, 616 F. Supp. 2d 63* (19 May 2009).

terrorist groups are, 'at a minimum', seen as lawful military targets under the laws of war.[34] Moreover, these supporters, when detained while accompanying said groups, can be detained under Article 4(4) of GCIII,[35] as they would in a situation of IAC.[36] As it can be seen, the rationale behind the analogy does not stem from any legal reasoning, but merely from the convenience and perceived appropriateness of the application of these provisions to situations of NIAC.[37]

Probably the most prominent defence of the use of analogy to fill the gaps in the law of NIAC was presented by Ryan Goodman. According to the author, since the IHL regime that regulates IAC is more restrictive than the framework for NIACs, any action that is authorised under the former regime would logically be considered legal under the latter. Consequently, if detention and targeting are permitted under IACs, they should also be allowed under its non-international equivalent.[38] The argument forwarded by Goodman is based on the *Lotus* principle, which dictates that sovereign states are free to act however they wish, unless limited by an explicit prohibition.[39] The reasoning presented would therefore be as follows: states' authorisation to detain and target can only be restricted by IHL norms, which are more prohibitive in situations of IAC. Therefore, if states are authorised to detain and

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[34] Curtis A. Bradley and Jack Goldsmith, 'Congressional Authorization in the War of Terror' (2005) 118(7) *Harvard Law Review*, 2113. See also Court of Appeals for the District of Columbia Circuit, *Hatim v. Gates*, 632 F.3d 720 (15 February 2011).

[35] Article 4(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

[36] Marty Lederman and Steve Vladeck, 'The NDAA: The Good, the Bad, and the Laws of War – Part I' (31 December 2011) *Opinio Juris*, available at http://opiniojuris.org/2011/12/31/the-ndaa-the-good-the-bad-and-the-laws-of-war-part-i/ accessed 08 November 2018.

[37] Kevin Jon Heller, 'The use and abuse…' *supra* at 31, 236.

[38] Ryan Goodman, 'Editorial Comment: The Detention of Civilians in Armed Conflict' (2009) 103(1) *American Journal of International Law*, 50; and 'Authorization versus Regulation of Detention in Non-International Armed Conflicts' (2015) 91 *International Legal Studies*, 161-162.

[39] Permanent Court of International Justice, S.S. Lotus (France v. Turkey), PCIJ Series A – No. 10, 7 September 1927, 18-20.

target under IACs, they are also permitted to do so in NIACs, as the analogy would not contravene any IHL provision.[40]

Under this reasoning, the application of IAC norms to NIACs becomes a matter of domestic law instead of IHL. The role of domestic humanitarian law in the creation of new domestic rules via analogy from related international law norms[41] would not only include the application of international humanitarian law and principles to a domestic level. In this context, domestic humanitarian law would also have a role in developing IHL by creating appropriate analogies from existing IHL norms. This analogy would then be applied to situations in which most players would agree that some form of international humanitarian coverage should exist, effectively creating new law and propelling the development of IHL norms and customs, as this domestic legislation would be considered state practice.[42] In this sense, an IHL norm applied to NIACs via municipal legislation would be considered legal as long as it would not conflict with the pre-established framework of international law.

The idea that the rules regulating IACs are more constraining than ones regulating NIACs, and therefore, regulating internal conflicts using the law of IAC would provide a more stringent protection is objectively flawed. For this view to be correct, one must assume that both regimes were created in a complementary way and are consistent with each other. This can be easily disproven by verifying situations in which the laws of NIAC are more restrictive than the IAC ones. For instance,

[40] Kevin Jon Heller, 'The use and abuse…' *supra* at 31, 237-238.
[41] Ashley Deeks, 'Domestic Humanitarian Law: Developing the Law of War in Domestic Courts' *in* Derek Jinks, Jackson N. Maogoto and Solon Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies* (Asser Press 2014), 152.
[42] *ibid.*, 153-155.

regarding the prohibition of child soldiering, the uncompromising stance of the GCs[43] is later replaced for an objective prohibition in Additional Protocol I (API) and APII.[44] The latter goes even further by prohibiting the recruitment of children under fifteen to the armed forces or to take any form of direct participation in the hostilities. Similarly, the protection of sites containing dangerous forces are inexistent in the laws of IAC, while they are extensively regulated in situations of NIAC.[45]

Additionally, as it was posited by Kevin Jon Heller, Goodman's theory could only be properly applied in a pre-World War II scenario, when international law, and particularly IHRL, had not yet been developed to the point of denying the *Lotus* principle of its then-absolute application.[46] As the Heller pointed out, three prohibitive rules currently limit the application of IACs rules for detention rules to NIACs via analogy: the principle of non-intervention, the prohibition on the use of force and the right to liberty under IHRL.[47]

While all three principles bear relevance to Heller's argument, considering that the current analysis is focussed on detention by NSAGs, only the third prohibitive rule will be discussed, as the previous ones require an entity possessing international legal personality.[48] Considering the understanding on the relationship between IHRL

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[43] Which only refer to a vague prohibition on the recruitment of child soldier in GCIV article 50: […] The Occupying Power shall take all necessary steps to facilitate the identification of children and the registration of their parentage. It may not, in any case, change their personal status, nor enlist them in formations or organizations subordinate to it.

[44] In article 77(2), Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I). Geneva, 8 June 1977; and in article 4(3)(c), Additional Protocol II.

[45] In article 56 of Additional Protocol I and article 15 in Additional Protocol II.

[46] Kevin Jon Heller, 'The use and abuse…' *supra* at 31, 238.

[47] *ibid.*

[48] Considering that the remaining elements rely on extraterritoriality and that the notions of non-intervention and the prohibition on the use of force are essentially state-centric, the relevance of these arguments to the current discussion is reduced. For more a detailed exposition of the remaining arguments, see Kevin Jon Heller, 'The use and abuse…' *supra* at 31, 239-240, 245-253. For a more detailed understanding on the relationship between international human rights law and international humanitarian law, as well as the application of former extraterritorially, see Orna Ben-Naftali (ed),

and IHL,[49] it is submitted that in the situations in question, namely the application of norms of IACS to NIACs, there is no conflict of norms. Instead, a subsequent modification or displacement of the relevant IHRL norm by a more specific rule of IHL is verified. As it is amply accepted by the scholarship, in the absence of a rule of IHL to regulate detentions in NIACs, this regulation invariably falls within the realm of IHRL. As such, the idea that a rule of domestic law has the power to displace a(n) (arguably) competing rule of international law by the application of the principle of *lex specialis* is completely unacceptable.[50] In this manner, the argument that states have the right to regulate themselves domestically as they see fit as long as they do not violate a prohibitive rule on international law collapses in face of the existence of prohibitive IHRL rules that do regulate detentions in NIACs, which consequently prevent the extension of an implicit authority to detain to NSAGs under an IHL framework.

### *1.B.2. Customary international law and principles of international law*

Another popular argument in defence of an implicit legal basis for detention in NIACs is the existence of customary norms providing authorisation. This view is shared by a number of authors,[51] as well as the International Committee of the Red Cross (ICRC).[52] Despite the strong support for such theory, this reasoning is problematic.

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*International Humanitarian Law and International Human Rights Law – Pas de Deux* (Oxford University Press 2011); and Marko Milanovic, 'Extraterritorial Application of Human Rights Treaties: Law Principles and Policy' *in* Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law:* Pas de Deux (Oxford University Press 2011).

[49] See Chapter 2.

[50] Kevin Jon Heller, 'The use and Abuse…', *supra* at 31, 243.

[51] For instance, see Robert E. Barnsby, 'Yes, we can: The Authority to Detain as Customary International Law' (2009) 202(1) *Military Law Review*; and Jelena Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force' *in* Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012), 94.

[52] International Committee of the Red Cross, *Internment in Armed Conflict: Basic Rules and Challenges – International Committee of the Red Cross (ICRC) Opinion Paper* (ICRC November 2014), 7.

The crystallisation of an international practice as customary is predicated upon two main elements, *opinio iuris* and state practice.[53] As proposed by Debuf, a detailed analysis of these elements has demonstrated that the existence of a customary IHL rule regulating detention in NIACs is either very recent or inexistent.[54] During the two conferences that paved the way for the adoption of the GCs and their Protocols I and II, states have reiterated the dominant rejection to the creation of any legal basis for detention in NIAC. They have repeatedly pointed out, instead, that such legal basis was already found in domestic law.[55] This assessment is coherent with the study carried out by the ICRC on customary IHL rules, that, contradicting its later opinion paper, concludes that there is no customary international rule allowing for detentions in situations of NIAC. The study found out that the recognised grounds for detentions in internal conflicts stem from military manuals, domestic legislation, official statements, as well as IHRL.[56] It was also determined that over 70 states specifically criminalised unlawful deprivation of liberty in NIAC, *i.e.* detentions without a clear legal base.[57] While this denial in authorising detentions under IHL was a minor limiting factor on states' sovereignty in the delegates' point-of-view, it fulfilled the objective of preventing the legalisation of this conduct, when carried out by NSAGs, in virtually any scenario.

Another reason against the acceptance of a legal basis for detention in customary international law lies on the nature of the alleged norm. As a rule to determine the legal basis for deprivation of liberty, a customary norm would need to determine on

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[53] See generally Kevin John Heller, 'Specially Affected States and the Formation of Custom' (2018) 112(2) *American Journal of International Law*.
[54] Els Debuf, *Captured in War… supra* at 27, 470.
[55] *ibid.*
[56] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules* (Cambridge University Press 2009), 347.
[57] *ibid.*, 344, 347.

which grounds detentions should be permitted, and with enough clarity as to allow for the individuals involved, to assess which conducts may give rise to a lawful deprivation of liberty.[58] While there seems to be some practical evidence that the norms found in articles 42 and 78 of GCIV could also be considered legal grounds for detention in NIACs, there is no agreement on which safeguards should be applicable to these situations. This uncertainty is only compounded the lack of both state practice and *opinio iuris* on the matter.[59] Consequently, if taken into account the lack of clarity on the nature and scope of an alleged rule, it remains clear that customary IHL does not regulate detentions in NIACs or even offers a legal basis for this conduct.[60] Nevertheless, it is important to carry a detailed analysis of the argument, which will be divided between the two constitutive elements of a customary norm, *opinio iuris sive necessitatis* and state practice.

*Opinio iuris*:

In order to have a crystallised custom, the conduct in question must be taken as legally binding by a significant number of states.[61] What is verified instead is that the absence of any reference to a legal basis for detention demonstrates that under IHL there is no prohibition, in opposition to authorisation, of these acts.[62] As it was aptly pointed out by Barnsby, an alleged customary IHL norm bestowing an implicit authority to detain is by nature permissive, which in turn would facilitate the verification of state practice and *opinio iuris*. A permissive norm would then, in comparison to its prohibitive or mandatory counterparts, merely not prohibit the

[58] Els Debuf, *Captured in War… supra* at 27, 470.
[59] *ibid.*, 470-471.
[60] *ibid.*, 471.
[61] James Crawford, *Brownlie's Principles of Public International Law* (9th edn Oxford University Press 2019), 23-26; and Malcolm Evans, *'International Law'* (5th edn Cambridge University Press 2018), 62-66.
[62] Lawrence Hill-Cawthorne, *Detention in Non-International… supra* at 27, 70.

conduct.[63] Nevertheless, what is verified instead is the recourse to an implicit legal authorisation.

The manifestations made by delegates in the *travaux préparatoires* from the Conventions and their two Additional Protocols recognising the existence of such practice, does not consist in *opinio iuris* in favour of a customary authority to detain. Rather, they are mere recognitions of the realities of a NIAC and the need for the creation of appropriate safeguards in these situations. In a very elucidative article, Kubo Mačák proposes that state representatives were not only aware of the indispensable role of detention during NIACs, but also accepted that the conduct would be carried out by both sides of the conflict, even addressing NSAGs specifically.[64] According to Mačák, as no mention was made regarding the unlawfulness of such detentions or the need for domestic authorisation, it could be presumed that the drafters of APII would find these requirements unrealistic.[65]

Moreover, when discussing what is now article 5 of the Protocol, in response to a question posed by the United Kingdom's representative on the scope of said article, the ICRC representative stated that the norm *'had been intended to cover all persons whose liberty had been restricted: persons interned without judicial proceedings and persons waiting trial during the whole period of their arrest until their release'.*[66] This view was accepted expressly by the Italian delegate, and tacitly

[63] Robert E. Barnsby, 'Yes we can…' *supra* at 51, 72.
[64] Kubo Mačák, 'A Needle in a Haystack? Locating the Legal Basis for Detention in Non-International Armed Conflict' (2015) 45 *Israel Yearbook on Human Rights*, 100, referencing Federal Political Department of Switzerland, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974-1977)* (Federal Political Department, Berne, 1978), volume VIII, pars 71, 73, and 87. Similarly, see Robert Chesney and Jack Goldsmith, 'Terrorism and the Convergence of Criminal and Military Detention Models' (2008) 60(4) *Stanford Law Review*, 1086, fn 26.
[65] *ibid.*
[66] *ibid.,* referencing Federal Political Department of Switzerland, *Official Records of the Diplomatic…volume VIII supra* at 64*,* par. 17.

by the remaining representatives. Taken in tandem with the abovementioned recognition of the importance of detention in armed conflict, this would, in the author's opinion, demonstrate that the drafters of APII intended to address this conduct from all parties to the conflict. Additionally, this would prove they were also aware that the legal basis for these acts could not derive from domestic law.[67] Ultimately, the position advanced by Mačák seems to overlook the fact that the discussion regarding the authorisation to detain in NIACs is never brought forward in the *travaux*, leaving us with insufficient evidence to claim that there is an authorisation to detain. Rather, it seems that the discussions point to the mere recognition of these acts, and the need to address detention standards and safeguards when they occur.[68]

Finally, it is relevant to point out that two specially affected states[69] – The United States and the United Kingdom – have adopted the theory of the customary basis to detain. As discussed above, the interpretation given to the construction of customary international law in US courts is based on a false premise, that the justification adopted by the government when detaining in NIACs relies on IHL. As it was demonstrated, instead of international law, the US government makes use of domestic legislation for detention operations in these scenarios, which in turn does not qualify as *opinio iuris sive necessitatis*, which does not contribute to the creation of a customary international norm.

[67] *ibid.*, 100-101.
[68] Lawrence Hill-Cawthorne, *Detention in Non-International… supra* at 27, 70.
[69] A point used by Barnsby to justify the detention practices of the United States as being sufficient to establish a customary international law norm. Robert E. Barnsby, 'Yes we can…' *supra* at 51, 75.

Regarding the United Kingdom, these claims seem to rely on *Serdar Mohammed v Ministry of Defence*.[70] In the aforementioned case, when defending the legality of the detention over 96 hours of Serdar Mohammed, the Ministry of Defence argued that *'Neither CA3 nor Article 5 of AP2 contains any express statement that it is lawful to deprive persons of their liberty in an armed conflict to which these provisions apply.* […] *The MOD argues, however, that a power to detain is implicit in CA3 and AP2'*.[71] This recognition of an implicit authorisation to detain was followed by the opinion that *'*[…] *even if there is no power to detain in a non-international armed conflict implicit in CA3 and AP2, such a power exists as a matter of customary international law'*.[72] As pointed out by Hill-Cawthorne, the position adopted by the Ministry of Defence should be seen with considerable reservations.[73] Firstly, because any changes resulting from the *Serdar Mohammed* case are not only isolated, but also very recent in detracting from the United Kingdom traditional view, which does not recognise a legal basis for detention in NIACs.[74] Secondly, and perhaps most importantly, because not only the position was rejected both at the High Court[75] and the Court of Appeal,[76] but also because the case was conclusively decided in the Supreme Court.[77] In a very detailed analysis of the implicit authorisation to detain grounded on customary international law,[78] Lord Reed decided

[70] United Kingdom High Court of Justice Queen's Bench, *Serdar Mohammed v. Ministry of Defence*, [2014] EWHC 1369 (QB).
[71] *ibid.*, par. 239.
[72] *ibid.*, par. 254.
[73] Lawrence Hill-Cawthorne, *Detention in Non-International… supra* at 27, 71.
[74] *ibid.*
[75] United Kingdom High Court of Justice Queen's Bench, *Serdar Mohammed v. Ministry of Defence supra* at 70, pars. 254-261.
[76] United Kingdom Court of Appeal (Civil Division), *Serdar Mohammed & Others v. Ministry of Defence; Yanus Rahmatullah and the Iraqi Civilian Claimants v. Ministry of Defence and Foreign Commonwealth Office*, [2015] EWCA Civ 843, pars. 220-244.
[77] United Kingdom Supreme Court, *Abd Ali Hameed Al-Waheed (Appellant) v. Ministry of Defence (Respondent); Serdar Mohammed (Respondent) v. Ministry of Defence (Appellant)*, [2017] UKSC 2.
[78] *ibid.*, pars. 243-276.

> *274. As the foregoing discussion makes clear, there are substantial arguments both for and against the contention that the Geneva Conventions or their Protocols implicitly confer authority under international law for detention in non-international armed conflicts. My current view, based on the submissions in the present case, is that the arguments against that contention - the textual arguments discussed in paras 260-261above, the contextual arguments discussed in paras 262-263, the arguments against inferential reasoning discussed in paras 264-267, and the arguments based on the absence of adequate protection against arbitrary detention discussed in paras 268-270 - are cumulatively the more persuasive.*
>
> *275. Customary international humanitarian law is a developing body of law, and it may reach the stage where it confers a right to detain in a non-international armed conflict. The submissions made on behalf of the Ministry of Defence have not, however, persuaded me that it has yet reached that stage. The contention that authority for detention in non-international armed conflicts is conferred by customary international humanitarian law is controversial as a matter of expert opinion. There appears to be a paucity of state practice which is supportive of the contention, as explained at para 272. In those circumstances, I have not been persuaded that there exists at present either sufficient* opinio juris *or a sufficiently extensive and uniform practice to establish the suggested rule of customary international law.*
>
> *276. In short, it appears to me that international humanitarian law sets out a detailed regime for detention in international armed conflict, conferring authority for such detention, specifying the grounds on which detention is authorised, laying down the procedures by which it is regulated, and limiting its duration, in accordance with the requirements of article 9 of the ICCPR and analogous regional provisions. In contrast, subject to compliance with minimum standards of humane treatment, international humanitarian law leaves it to states to determine, usually under domestic law, in what circumstances, and subject to what procedural requirements, persons may be detained in situations of non-international armed conflict. It follows that the Ministry of Defence's argument in the present case that the detention of Mr Al-Waheed and Mr Mohammed was authorised by conventional or customary international humanitarian law should be rejected.*[79]

The vote was followed by Lord Sumption, which was supported by the majority of the Court, and that expanded on the argument that customary international law is yet to develop to allow for detention in NIACs. Nevertheless, the Justice makes the caveat that the question is not yet settled.

[79] *ibid.*, pars. 274-276.

> *14.To establish the existence of a rule of customary law, two things are required. First, there must be a uniform, or virtually uniform practice of states conforming to the proposed rule, reflected in their acts and/or their public statements; and, secondly, the practice must be followed on the footing that it is required as a matter of law (opinio juris). It follows that although the decisions of domestic courts may be evidence of state practice or of a developing legal consensus, they cannot themselves establish or develop a rule of customary international law: see Jones v Ministry of the Interior of the Kingdom of Saudi Arabia[2007] 1 AC 270 at para 63 (Lord Hoffmann). Lord Reed has dealt fully in his judgment with the question whether the detention of members of the opposing armed forces is sanctioned by customary international law in a non-international armed conflict. He concludes that as matters stand it is not, and I am inclined to agree with him about that. But for reasons which will become clear, I regard it as unnecessary to express a concluded view on the point. It is, however, right to make certain observations about it which bear on the construction of the relevant Security Council Resolutions.*
>
> […]
>
> *16. Second, if there is nevertheless an insufficient consensus among states upon the legal right of participants in armed conflicts to detain under customary international law, it is not because of differences about the existence of a right of detention in principle. At their most recent international conference (Geneva, 8-10 December 2015), the constituent associations of the Red Cross and Red Crescent approved a resolution by consensus which recited that states had the power to detain "in all forms of armed conflict" and proposing measures to strengthen the humanitarian protection available to detainees. The lack of international consensus really reflects differences among states about the appropriate limits of the right of detention, the conditions of its exercise and the extent to which special provision should be made for non-state actors. There is no doubt that practice in international and non-international armed conflicts is converging, and it is likely that this will eventually be reflected in opinio juris. It is, however, clear from the materials before us that a significant number of states participating in non-international armed conflicts, including the United Kingdom, do not yet regard detention as being authorised in such conflicts by customary international law.*[80]

In this sense, while still passive to changes, the United Kingdom's position on the existence of a legal basis to detain in IHL of NIAC remains unaltered, and the theory

[80] *ibid.*, pars. 14 and 16.

that such authority is found in customary international law not being accepted by the state as a matter of *opinio iuris*.

State practice:

The second element of customary international law, state practice, is also pointed out as being widespread to the point of characterising an international custom.[81] This element, when considered alone, does not possess the capacity to dictate the source of the authority detentions are based on. While armed forces' manuals, rules of engagement cards, among other operational documents, may describe the instances of authorised detention, it is necessary to clarify that these authorisations must be viewed under an operational, and not a legal perspective. This consideration must be raised as the armed forces may allow or determine a behaviour that is contrary to IHL or IHRL, which would be unlawful regardless of its authorisation.

Moreover, the abovementioned documents would only possess value for the construction of a customary international norm if also informing the legal basis for these procedures, therefore, demonstrating *opinio iuris*. Practice alone, instead of proving the existence of an implicit basis for detention in NIAC, just reinforces the idea that there is no prohibition do detain in such situations.[82]

Interestingly, when defending the customary international law theory, Barnsby maintains that sufficiently dense state practice is enough to demonstrate the customary status of an international law rule, without the need for *opinio iuris*.[83] This argument is especially interesting, since it has the power to brush over the rather

[81] For instance, Robert E. Barnsby, 'Yes we can…' *supra* at 51.
[82] Lawrence Hill-Cawthorne, *Detention in Non-International… supra* at 27, 70.
[83] Robert E. Barnsby, 'Yes we can…' *supra* at 51, 74, referencing Jean-Marie Henckaerts, 'Assessing the Laws and Customs of War: The Publication of *Customary International Humanitarian Law'* (2006) 13(2) *Human Rights Brief*, 9.

fragile evidence of *opinio iuris* in favour of a customary base for detentions. The problem with this affirmation is that, as stated above, it presumes a permissive rule from state practice, while it demonstrates merely a non-prohibition, particularly in light of existing *opinio iuris*. While the determination of a 'dense practice' can be more verified more easily in prohibitive or mandatory norms, as they expect one single appropriate conduct, this evaluation is much harder in the case of a permissive rule, which allows for two different conducts.

When examining the possibility of a customary rule on detention in situations of NIAC, it rests clear that, while state practice alone does not provide enough evidence to declare the existence of such basis. *Opinio iuris*, on the other hand, points out in its overwhelming majority to other sources aside from customary international law, including domestic legislation, Security Council resolutions and the right to self-defence, as the legal fundament for deprivation of liberty.

*1.B.3. Authority to detain derived from targeting*

A very popular theory for the existence of an implicit authority for detention in NIACs is the one in which the authority to detain is premised on the alleged authority to kill in a NIAC.[84] This theory is advanced by the direct relationship between targeting and detention in NIACs.

[84] See for instance, Daragh Murray, *Human Rights Obligations…supra* at 7, 241-242; Sean Aughey and Aurel Sari, 'Targeting and Detention in Non-International Armed Conflict: *Serdar Mohammed* and the Limits of Human Rights Convergence' (2015) 91 *International Law Studies*. Additionally, a very enriching thread of discussions was published in EJIL: Talk! blog relating mostly to this theory on the legal authority to detain in non-international armed conflict. See Marko Milanovic, 'High Court Rules that the UK Lacks IHL Detention Authority in Afghanistan' (3 May 2014) *EJIL: Talk!*; Kubo Mačák, 'No Legal Basis under IHL for Detention in Non-International Armed Conflicts? A Comment on Serdar Mohammed v. Ministry of Defence' (5 May 2014), *EJIL: Talk!*; Lawrence Hill-Cawthorne and Dapo Akande, 'Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?' (7 May 2014), *EJIL: Talk!*; Aurel Sari, 'Sorry Sir, We're All Non-State Actors Now: A Reply to Hill-Cawthorne and Akande on the Authority to Kill and Detain in NIAC' (9 May 2014) *EJIL: Talk!*; Lawrence Hill-Cawthorne and Dapo Akande, 'Locating the Legal Basis for Detention in Non-International Armed Conflicts: A Rejoinder to Aurel Sari' (2 June 2014), *EJIL: Talk!*; Sean Aughey and Aurel Sari, 'IHL

Considering that the laws of targeting are permissive rules as well, the lack of any explicit prohibition on CA3 and APII would mean that killing combatants and fighters is permitted under IHL of NIAC. It is submitted that, as can be seen from the aforementioned provisions distinguish between civilians and non-civilians, CA3 talks about '[p]*ersons taking no active part in the hostilities'*.[85] APII, on the other hand, regulates the fundamental guarantees of '[a]*ll persons who do not take a direct part or who have ceased to take part in hostilities'.*[86] Both of these are made in opposition to the protection of the civilian population,[87] therefore, if the principle of distinction continues to apply in NIACs, then, those who are considered non-civilians would be able to be targeted, otherwise there would be no point in assuring their protection when they are *hors de combat*.[88]

This idea is supported by the examination of the commentary on the Additional Protocols, which determines that civilians lose their right to protection under the protocol when they take direct part in hostilities, and as such, they may be targeted as long as they participate. In reference to members of the armed forces and armed groups, the commentary states that they may be targeted at any time.[89] This position seems to be consistent with the ICRC Interpretive Guidance on direct participation in hostilities.[90] The existence of such permissible implicit rule would be predicated on the principle of necessity, which would determine that it is necessary, in order to gain

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Does Authorise Detention in NIAC: What the Sceptics Get Wrong' (11 February 2015), *EJIL: Talk!*; Rogier Bartels, 'IHL Does Not Authorise Detention in NIAC: A Reply to Sean Aughey and Aurel Sari' (16 February 2015), *EJIL: Talk!*; and Sean Aughey and Aurel Sari, 'IHL Does Authorize Detention in NIAC: A Rejoinder to Rogier Bartels' (24 February 2015), *EJIL: Talk!*.

[85] Common Article 3(1).

[86] Article 4(1), Additional Protocol II.

[87]Article 13, Additional Protocol II.

[88] Sean Aughey and Aurel Sari, 'Targeting and Detention in Non-International…' *supra* at 84, 100-102.

[89] Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Kluwer 1987), pars. 4787, 4789.

[90] Nils Melzer, *Interpretive Guidance on the Notion… supra* at 2, 69-85.

a military advantage against an opponent, to possess the ability to target their forces.[91]

Based on this premise, supporters of this theory raise and argument based on the principle of humanity, which is in turn derived from the Martens clause.[92] According to this reasoning, if the parties to the conflict have the right to target their opponents in order to achieve a military advantage, then, considering that detaining an opposing fighter provides a similar level of advantage, it would be preferable to detain instead of kill. Since detention is preferable than targeting, there should, therefore, be an implicit authorisation to do so,[93] under the risk of incentivising the killing of targetable individuals over their capture, even if the situation is more conducive to their detention.[94]

In addition to the humanitarian consideration for detention, Aughey and Sari also consider operational considerations. They sensibly contend that killing every single opponent in the battlefield may not be necessary and at times counter-productive, since it prevents the acquisition of intelligence, and the creation of an atmosphere conducive to reconciliation at the end of the conflict.[95] Furthermore, one can argue that the prohibition of detention would deprive the parties from opportunities to engage in positive propaganda that would facilitate the non-violent administration of controlled territory and the recruitment of new members. These are equally important

[91] Sean Aughey and Aurel Sari, 'Targeting and Detention in Non-International…' *supra* at 84, 99-100.
[92] Hague Convention II with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899. '(…)Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience.'
[93] Daragh Murray, *Human Rights Obligations…supra* at 7, 241-242.
[94] Ryan Goodman, 'Editorial Comment: The Detention…' *supra* at 38, 55-56.
[95] Sean Aughey and Aurel Sari, 'Targeting and Detention in Non-International…' *supra* at 84, 106.

elements in the protection of civilians and the ability of NSAGs to replenish its manpower without resorting to expedients such as the pressing of the civilian population or the recruitment of child soldiers.[96]

The argument linking the authority to target with the authority to detain is indeed reasonable. If there is to be an authority to target, then it would be absolutely unacceptable that IHL of NIACs would not predict the possibility of detention, which is a much less grievous method of defeating an opponent, as well as more useful than eliminating enemy soldiers. The problem with this reasoning lies with the assumption that there is an implicit authority to resort to lethal force. Much like as it has been seen above when discussing the customary IHL theory, instead of identifying an implicit permissive rule of targeting, the authors have actually identified the non-prohibition of this conduct, as well as the instances in which it is actually prohibited.[97] Once again, the answer to this problem, under a state-centric perspective, is that even though the authorisation to target does not exist under IHL of NIACs, states are still permitted to use force against insurgents under their own domestic law, while denying, at the same time, the same authorisation to NSAGs.

It is important to point out that this equivalence, if it was applicable, would be very constraining, particularly in relation to NSAGs. If the capacity to detain were to be founded in the capacity to target, then there would be no legal basis for internment-

[96] A good example of how detention can be used as means for positive propaganda can be seen during the Cuban revolution, as the standard policy of the revolutionary army having as its policy the releasing of captured detainees. These detainees would be assured that they will not be mistreated and that they would be released as soon as possible to the Cuban Red Cross. They would also be assured that, in case of future capture, the same procedure would be applied – over and over again –, the option of joining the revolutionaries always being offered, but only in a voluntary manner. It is undisputed that this stance towards the enemy forces has motivated in part the good reputation of the Castro's forces, swaying the population's support the revolution's side, as well as granting the *revolucionarios* with additional soldiers from Batista's ranks. Sandesh Sivakumaran, *The Law of Non-International… supra* at 5, 300-301.

[97] Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 27, 73-74.

like detentions along the lines of articles 42 and 78 of GCIV, as these individuals would not qualify as targetable, and consequently could not be detained. Regarding the nature of these forms of detention, the commentary to the GCs makes it clear that individuals under security detention find themselves in this situation without having acted in a direct way against the detaining power. All that is needed is that the belligerent has *'serious and legitimate reason to think that they are members of organizations whose object is to cause disturbances, or that they may seriously prejudice its security by other means, such as sabotage or espionage'.*[98] The lack of a legal basis for security detention would then mean that NSAGs would not be able to detain members of other organisations that were not directly participating in hostilities.

### 2. The consequences of the absence of a legal basis for detention for NSAGs

As demonstrated above, the legal basis for detention in NIACs does not rest on IHL, but in the states' domestic legislation. The lack of an express authorisation by the former does not presuppose an implicit authorisation, but the lack of a prohibition. This was the manner the delegates at the two Geneva conferences found to prevent insurgents from being "legitimised" by being legally authorised to target and detain. This silence, on the other hand authorised state governments, as entities possessing full international legal personality, to create their own legal bases for detention. This situation of clear unbalance, nevertheless, raises two very important questions relating to the consequences of this circumstance. These are the status of detentions carried out without a legal basis, and the effects this asymmetric scenario has on IHL compliance and civilian protection.

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[98] Jean Pictet (ed), *The Geneva Conventions of 12 August 1949 – Commentary*, vol. IV (ICRC, 1958), 258.

### *2.A. Detaining without a legal basis*

The easiest conclusion to be reached in these situations – *i.e.* when a NSAG detains an individual for an act related to a NIAC – is that there is a violation of IHL, and in some cases, such actions would amount to war crimes.[99] A better argument, however, proposes that the mere detention without a legal basis in IHL does not amount to an illicit act neither in IHL nor in International Criminal Law.[100]

As IHL on NIACs sets up a permissive norm in relation to detentions, this conduct is *a priori* not illegal, unless it is carried out arbitrarily.[101] In accordance to the ICRC customary law study, the prohibition of arbitrary detentions has achieved customary status in IACs and NIACs. This rule is present in CA3, as well as in both APs, as a consequence of the right to be humanely treated.[102] The prohibition of arbitrary deprivation is then to be found, in accordance to state practice, in military manuals, national legislation and case-law, in official statements, as well as in IHRL.[103]

Of particular importance to NSAGs, and demonstrating the complementarity between legal regimes in NIACs, the IHRL provisions seem to be the main guiding elements for a non-arbitrary detention. The most prominent norm providing for the right to liberty and security of persons is article 9(1) of the International Covenant on Civil and Political Rights (ICCPR), that states that *"[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such*

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[99] As *per* article 8(2)(c) III, Rome Statute of the International Criminal Court of 17 July 1998 Amended on 29 November 2010.
[100] See, for instance, Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 27, 75-76; Els Debuf, *supra* at 26, pp.478-485; and Andrew Clapham, 'Detention by Armed Groups…' *supra* at 27.
[101] Lawrence Hill-Cawthorne, *Detention in Non-International… ibid.*, 91-95; and Els Debuf, *supra* at 26, p. 479.
[102] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian… Volume I: Rules supra* at 56, 344.
[103] *ibid*., 347.

*procedure as are established by law."*[104] Other important IHRL treaties that provide for the explicit protection of the liberty of persons are the Universal Declaration of Human Rights;[105] the Convention on the Rights of the Child;[106] the European Convention on Human Rights, in a *contrario sensu* interpretation, by providing the grounds on which a person may be deprived of their liberty;[107] the African Charter on Human and Peoples' Rights (ACHPR);[108] and the American Convention on Human Rights (ACHR).[109]

Concerning the requirement set in article 9(1) of the ICCPR, the ICRC customary study concluded that in order not to be arbitrary, the detention that is being carried out must be based on pre-determined grounds.[110] Moreover, these grounds must continue to exist for as long as the deprivation of liberty lasts, under the risk of becoming a violation of the principle of legality and amounting to arbitrary detention.[111] This broader interpretation of the concept of a non-arbitrariness is supported by the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, when the tribunal, while analysing the occurrence of the crime against humanity of imprisonment, was of the view that *"*[…] *a deprivation of an individual's liberty will be arbitrary and, therefore, unlawful if no legal basis can be called upon to justify the initial deprivation of liberty. If national law is relied upon as justification, the relevant provisions must not violate international law."*[112]

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[104] Article 9(1), International Covenant on Civil and Political Rights (ICCPR). 16 December 1966.
[105] Articles 3 and 9, Universal Declaration of Human Rights. 10 December 1948.
[106] Article 37(b), Convention on the Rights of the Child. 2 September 1990.
[107] Article 5(1), European Convention on Human Rights. 4 November 1950.
[108] Article 6, African Charter on Humans and Peoples' Rights. 27 June 1981.
[109] Article 7(3), American Convention on Human Rights. 22 November 1969.
[110] Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 27, 134.
[111] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian… Volume I: Rules supra* at 56, 348-349.
[112] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Milorad Krnojelac*, Judgement (Trial Chamber II), IT-97-25-T, 15 March 2002, par. 114.

As can be seen, by raising the possibility of having domestic law as a legal basis for detentions, the Tribunal demonstrated that the basis for this justification may be found elsewhere, as long as it is clear and pre-existent. Decisions in the International Criminal Tribunal for Rwanda such as in *Ntagerura, Bagambiki, and Imanishimwe* further demonstrate the more flexible approach adopted by international organisations.[113]

Consequently, when providing a justification to detain, NSAGs have the possibility of applying – via the domestic prescriptive jurisdiction –[114] the legislation enacted by the state's government, as it is a legal document already in place, and, as such, is amply recognised and acknowledged. Alternatively, in a situation in which the total displacement of state authority has been verified, the entity is in possession of sufficient territorial control and carrying out significant state-like functions, it may decide to apply its own regulations, if they are clear, pre-existent, and in accordance with IHRL.

When carrying out detentions under these conditions, insurgent groups are not in violation of IHL norms, even though they are still violating their parent state's domestic law and its members are still liable to prosecution for such conducts. The same can be said in respect to war crimes and crimes against humanity. As previously mentioned, a superficial analysis of the situation may provide the conclusion that a commander may be criminally liable for such acts, as the Rome Statute prohibits the taking of hostages, and as it is often the case, these detentions are depicted as such. A more detailed analysis of the Statute shows that, in order to

[113] International Criminal Tribunal for Rwanda, *Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe,* Judgement and Sentence (Trial Chamber III), ICTR-99-46-T, 25 February 2004, par. 702.

[114] This principle was already explored, with particular emphasis on its international dimension in the previous chapter.

be considered hostage-taking, these detentions must be premised on the threat of death, injury or indefinite detention of the individual, if a state, an international organisation, a natural or legal person or a group of persons does not act of refrain from acting in a certain manner, being this omission or commission a condition (explicit or implicit) for the safety or release of the detainee.[115] When conducting detention operations under a pre-existing justification, which is in accordance to IHRL standards and that does not require any conduct or stance from another entity, there can be no international criminal responsibility. In the same manner, the crime against humanity of imprisonment[116] cannot be committed when there is a pre-established justification for detention, in accordance with international law, as seen in *Krnojelac*[117] and *Ntagerura et al*.[118]

### *2.B. The effects of detention asymmetry in NIACs*

The fact that detentions, when not arbitrary, are deemed to be illegal in IHL, places NSAGs in a situation of particular imbalance of forces in relation to states. Instead of having a legal basis to detain, these entities have only duties towards their prisoners.[119] Based on this apparent violation of the principle of equality belligerents, some authors[120] have suggested that denying the existence of a legal basis for detention in NIAC would be a violation of said principle, since it would bestow states

[115] International Criminal Court, Elements of Crimes (as amended), 2 November 2000, ICC-ASP/1/3 (Pt II-B), UN Doc PCNICC/2000/1/Add.2, 33.
[116] Article 7(1)(e), Rome Statute…*, supra* at 99.
[117] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Milorad Krnojelac*, Judgement (Trial Chamber II), *supra* at 112.
[118] International Criminal Tribunal for Rwanda, *Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe,* Judgement and Sentence (Trial Chamber III), *supra* at 113.
[119] To put it in the words of Andrew Clapham, 'Detention by Armed Groups…' *supra* at 27, 14.
[120] Particularly, Kubo Mačák, 'A Needle in a Haystack…' *supra* at 64, 99-100; Sean Aughey and Aurel Sari, 'Targeting and Detention in Non-International…' *supra* at 84, 94-95; Anyssa Bellal and Ezequiel Heffes, '"Yes, I do": binding armed non-state actors to IHL and human rights norms through their consent' (2018) 12(1) *Human Rights and International Discourse*, 127-128; Ezequiel Heffes and Brian E. Frenkel, 'The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules' (2017) 8(1) *Goettingen Journal of International Law*, 53-55; and generally Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law' (2010) 1(1) *International Legal Studies.*

with powers that are not extended to NSAGs. While the argument is a relevant criticism to the current architecture of IHL of NIAC and the way it has been built, it must be recognised that, as a matter of law, there is no disrespect to the principle of equality of belligerents. While there is a *de facto* asymmetry, the absence of an explicit authorisation to detain in NIACs touches states and non-state actors alike, as neither can rely on treaty-based provisions or customary international law to carry on such operations.[121] The inequality that does exists rests in domestic law, which was deliberately devised to allow state agents exclusivity to detain.

*2.B.1. Common Article 1 and the obligation to ensure respect*

In response to this situation, it could be noted that states, despite being in a position of formal equality with NSAG under IHL, have an obligation to prevent violations that may occur from the lack of domestic regulation. Thus, by creating a framework that incentivises the violation of IHL, and by not providing incentives for NSAGs to respect the requirements for detention found in Article 9(1) of ICCPR,[122] states are at least bound to prevent potential and imminent violations that are, in part, caused by them. This obligation to prevent IHL violations is found in CA1, which determines that *'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.'*[123]

From the content of the article, it is possible to determine that two obligations exist, the obligation to respect and the obligation to ensure respect. While the obligation to respect requires the High Contracting Parties not to violate the rules of IHL themselves, the obligation to ensure respect determines that they must prevent

[121] Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 27, 74-75.
[122] Marco Sassòli, 'Taking Armed Groups Seriously…' *supra* at 120; and David Tuck, 'Detention by armed groups: overcoming challenges to humanitarian action (2011) 93(883) *International Review of the Red Cross*, 765-766.
[123] Common Article 1 to the Geneva Conventions of 1949.

violations committed by others.[124] The obligation to ensure respect, in its turn, can be divided into its internal and external compliance dimensions, the first addressing violations from states' private actors, as well as governmental organs, while the external dimension relates to breaches committed by other states, as well as non-state actors.[125]

While CA1 is not clear on the existence of the external dimension of the obligation to ensure respect, there is abundant evidence of state and international organisation practice supporting such possibility.[126] This acceptance is particularly evident by its in the jurisprudence of International Court of Justice. In the *Bosnian Genocide* case, the Court decided in favour of the existence of the obligation to ensure respect for the Convention in its external dimension, adding that the prevention of genocide was an obligation of conduct and not of result.[127] In the *Wall* advisory opinion, the Court extended this obligation to CA1, suggesting that

> *All States Parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention'.*[128]

[124] Robin Geiβ, 'The Obligation to Respect and Ensure Respect for the Conventions' *in* Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015), 116-117.
[125] *ibid*, 117-126.
[126] See, for instance, Birgit Kessler, 'The Duty to "Ensure Respect" Under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts' (2001) 44 *German Yearbook of International Law*, 504; Carlo Focarelli, 'Common Article 1 of the Geneva Conventions: A Soap Bubble?' (2010) 21(1) *European Journal of International Law*, 128.
[127] International Court of Justice, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, 26 February 2007, (Bosnian Genocide), par. 430.
[128] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004 *(The Wall advisory opinion),* par. 159. The Court has emitted a similar opinion in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgement of 27 June 1986*, par.* 220.

This has also been the consistent position of the ICRC, which considers that this rule is applicable as matter of customary international law.[129] This stance has never been opposed or criticised in the international arena.[130]

The obligation to ensure respect is not only applicable to other states. Very importantly, this rule is also extended to non-state actors in general, as long as these entities are also bound by the GCs.[131] Considering that, as previously discussed in Chapter 2, section 1., NSAGs are considered addressees of the GCs as long as they reach the minimum threshold of CA3, it is clear that states have the obligation to ensure these actors respect the provisions of the GCs. The response to these breaches of IHL must be reactive, as well as preventive.[132]

Considering the obligation states have towards ensuring that NSAGs do not violate the laws of the armed conflict, employing all means that are reasonably available to them,[133] *ad hoc* agreements between them and insurgent groups acquire particular importance. Consistently with CA1, CA3 determines that the parties to NIACs *'should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention'*.

The conclusion of agreements in relation to IHRL and IHL is not a rare occurrence, with prominent examples, such as the agreement between all parties in the Bosnian conflict, concluded in May 1992, recognising, among other things, the application of

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[129] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian… Volume I: Rules supra* at 56, 509.
[130] Robin Geiβ, 'The Obligation to Respect…' *supra* at 124, 122.
[131] *ibid*., 126. Additionally, this seems to be the position of the International Court of Justice. In the *Bosnian Genocide* case, when deciding in favour of the existence of the external obligation to ensure respect, the Court has deliberately used the term 'actors'. International Court of Justice, *Bosnian Genocide*, *supra* at 127, par. 430.
[132] Robin Geiβ, 'The Obligation to Respect…' *Ibid.*
[133] International Court of Justice, *Bosnian Genocide*, *supra* at 127, par. 430. Discussing the obligation to prevent Genocide, which is equated to the obligation in Common Article 1.

the four GCs to instances of detention.[134] Other similar agreements were the ones adopted between the government of the Philippines and the National Democratic Front of the Philippines in 1998, the agreement between El Salvador and the Frente Farabundo Martí para la Liberación Nacional (FMLN) in 1990, and the 2002 agreement between Sudan and the Sudan People's Liberation Front (SPLM).[135] By recognising the authority of NSAGs to detain in a binding declaration,[136] states have the potential to provide the necessary incentive for these groups to comply with IHL, consequently protecting its own troops and civilian population. These declarations also allow states to pave the way for a peaceful transition at the end of the conflict by showing a positive disposition towards negotiation, without the need to recognise NSAGs as subjects of international law.

### 3. Is there a legal basis for NSAG detention under IHRL?

As previously mentioned in Chapter 2, section 2., while the exact role IHRL in armed conflict – and particularly in its non-international variation – has been a matter of contention,[137] the application of this branch of law to situations of conflict is nearly unanimously accepted both in the scholarship and international practice.[138] Instead

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[134] Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law – Volume III: Cases and Documents* (ICRC 2011), 1717.

[135] Sandesh Sivakumaran, *The Law of Non-International… supra* at 5, 125-131.

[136] *ibid.*, 114.

[137] For different approaches see, for instance, Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015); Roberta Arnold and Noëlle Quénivet (eds), *"International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law"* (Martinus Nijhof 2008); Françoise Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body' (2008) 90(871) *International Review of the Red Cross*; and Marko Milanovic, 'The Lost Origins of *Lex Specialis*' *in* Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge University Press 2016).

[138] The most prominent representatives of this resistance in the acceptance of international human rights law in armed conflict being Russia, United States and Israel, which apply the doctrine of total displacement, that determines that since international humanitarian law is the *lex specialis*, it displaces in full the whole body of international human rights law. For an example of the application of this approach, see Michelle Hansen, 'Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict' (2007) 194 *Military Law Review*.

of applying a displacement theory – be it total or partial – the best approach to this conflict of norms should be use of the norm conflict avoidance approach. This method suggests that the principle of *lex specialis* should be seen as a materialisation of the principle found in article 31(3)(c) of the Vienna Convention on the Law of the Treaties that determines that when interpreting a treaties, the whole body of applicable norms of international law must be taken into consideration.[139] As such, while the less specific provisions of CA3 and APII regulating the procedural safeguards of detention should be informed by the more specific IHRL,[140] the legal basis for detention in NIACs should ultimately remain a matter of IHL. Nevertheless, as can be observed from the analysis conducted in this section, as IHL does not establish neither a prohibitive nor a mandatory rule, the legal basis for detention in internal conflicts remains a matter of domestic law.

Although the most significant instances of detention by NSAGs are premised on the existence of an armed conflict, in some situations, they may exist outside a NIAC.[141] These scenarios of rebel governance may occur when state's authority has been completely displaced. Consequently, the existing legal vacuum must be filled by these same entities, that exercise effective sovereignty over the territory and its population, even after the NIAC that triggered the recognition of these groups' limited international personality ceases to exist.[142] In these hypotheses of complete authority displacement, the need to maintain public order and protect the population from the absence of an established government may require the adoption, or even

[139] Marko Milanovic, 'The Lost Origins…' *supra* at 137, 106-107.
[140] *ibid.*, 108; and Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 27, 134.
[141] Daragh Murray, *Human Rights Obligations…supra* at 7, 226-227.
[142] Liesbeth Zegveld, *Accountability of Armed Opposition… supra* at 27, 15; Michael Schoiswohl, '*De Facto* regimes and Human Rights Obligations: The Twilight Zone of Public International Law' (2001) 6 *Austrian Review of International and European Law*, 50; and Daragh Murray, *Human Rights Obligations… ibid.*

the creation, of specific legislation by these NSAGs.[143] This provisional body of law is sometimes produced under pressure from the population, and are oftentimes well-received as a better alternative than the absence of laws.[144]

The application of state-enacted norms may be an easier option for these groups, as there is no capacity-building requirement involved.[145] The application of already established norms also carries the advantage of familiarity on the part of the population. On the other hand, this might look like an unlikely decision, as the very existence of rebel groups is based on the non-recognition of the ruling government, its laws being the ultimate symbol of oppression. Nevertheless, recent examples have shown that this practice does occur. In the conflict in Syria, for example, there have been reports of NSAGs in effective control of territory using the state's criminal law and court system to enforce public order.[146] The same can be said about the National Transitional Council, which applied the Libyan Criminal Code when detaining fighters.[147]

Similarly, NSAGs may decide to, instead of enforcing state law, apply religious laws, as was seen in Syria by the Al Nusrah Front,[148] but also in Indonesia, Lebanon and Iraq with the application of the *Shari'a*. Another optional source of legislation may be the traditional or customary laws applicable in the region, as seen in the case of the Sudan People's Liberation Army.[149] Despite being alternative forms of law, these

[143] Daragh Murray, *Human Rights Obligations… ibid.*, 227.
[144] David Tuck, 'Detention by armed groups…*' supra* at 122, 772-774; International Crisis Group, *Somalia: Al-Shabaab – It Will be a Long War* (2014), 8, 15; and *The Huthis: from Saada to Sanaa* (2014), 6.
[145] Daragh Murray, *Human Rights Obligations…supra* at 7, 231.
[146] Human Rights Watch, *Syria: End Opposition Use of Torture, Executions* (Human Rights Watch 2012), 3.
[147] Daragh Murray, *Human Rights Obligations…supra* at 7, 231.
[148] *ibid.*
[149] Monyluak Alor Kuol, *Administration of Justice in the (SPLA/M) Liberated Areas: Court Cases in War-Torn Southern Sudan* (1997), 12.

must still comply with the requirements posited by article 9(1) of ICCPR, which means they must not be arbitrary. Furthermore, these provisions must respect the procedural safeguards contained in CA3 and APII, which are informed by the additional provisions on the Covenant, such as the prohibition of torture, cruel, inhuman or degrading treatment, as well as other regional and IHRL treaties, the UN Convention against Torture, and the International Convention for the Protection of All Persons from Enforced Disappearance.

## 4. Conclusion

The purpose of this section was to address the current debate on the legal basis for detentions carried out by NSAGs. As an introductory remark, the definition of the umbrella term ‘detention’, as well as its many categories was discussed, considering the views of the UN Human Rights Council. Following this clarification, the existence of a legal basis for detention in IHL for NSAGs was discussed. It was submitted that the current provisions applicable to these groups, mainly CA3 and APII, did not provide an explicit authorisation or prohibition, which, in turn, allowed for many theories to flourish.

In sequence, these theories were explored. The theory that proposes that the recognition of a legal authority to armed groups is equated to a political recognition was presented and rebuffed, as it was not the intention of the Conventions and their Protocols to alter the legal status of conflicting parties. The theory that defends the use of analogy between IACs and NIACs was also examined. This position, which is mainly defended by the United States and proposes that insurgent groups are subjected to IAC treaty law lacks a consistent legal base, usually being accepted without questioning. An exception to this omission is the defence presented by Ryan Goodman, who argued that since the laws of IAC are more restrictive that their non-

international counterparts, any action that is allowed under the former should also be applicable in the latter. In justifying his position, Goodman claimed the application of the *Lotus* principle, that determines that states are free to act however they wish, unless limited by an explicit prohibition. This reasoning proved to be flawed for two reasons, the first being the inaccuracy of the claim that IACs are regulated by stricter rules, and the second being that, if the *Lotus* principle is to be used, the analogy would be impossible, as it would imply that IHL of NIAC can be informed by provisions of domestic humanitarian law.

The following theory to be analysed was the customary international law hypothesis, according to which the legal basis for detention in NIACs does not rest in treaty law, but in crystallised customary norms. This is a particularly popular argument, advanced by many authors as well as the ICRC. A detailed examination of the *opinio iuris* presented as evidence of this alleged customary provision demonstrated that instead of manifestations of support, states have merely recognised the existence of this practice, particularly in relation to NSAGs. The analysis of the *travaux préparatoires* of the Conventions and their Protocols is especially relevant, as it illustrates the acknowledgement of these acts by the drafters, as well as their refusal to regulate them. This omission is found to be deliberate, as it would allow for states to enact domestic regulations allowing detentions by state agents while denying the same rights to NSAGs, and at the same time respecting the humanitarian principle of equality of belligerents. The analysis of the current state practice yielded similar results.

Another popular argument that was explored was the theory proposing that the authority to detain is derived from the authority to target enemy fighters. This assertion defends that, if targeting is allowed in NIACs, then, as detention is a less

grievous alternative, it should be then allowed, as it is preferable to detain rather than to kill. This idea, of course, is based on the presupposition that the authority to kill also exists in NIAC. Similar to the theory of the customary status of detention, the idea that targeting is allowed in NIACs is based on the silence of the law, which, it must be said, cannot be presumed to be equated to authorisation. This theory possesses another important flaw that is often overlooked. In many instances, the detention is not carried out in a situation in which targeting is allowed, particularly in cases of security detention.

This section is concluded with the acknowledgement that there is no legal basis for detention in IHL of NIACs, and consequently there is no legal basis for detention for NSAGs in IHL, as it exists in the realm of domestic law. The following section explored the consequences of detaining without a legal basis. It demonstrated how carrying out detentions without a legal basis is not necessarily a violation of IHL. As long as the requirements set out in CA3 and APII, namely the right to be humanely treated, informed by article 9(1) of ICCPR, are respected, a detention is not considered to be a violation of international law, although it remains a crime under domestic law. The effects of this factual asymmetry were explored, particularly the obligation of state to prevent violations of IHL caused by these armed groups. The role of states in creating a situation that is conducive to violations of international law, and the incentives to conclude mutual agreements with these groups in order to induce their compliance were presented and explored.

In the last section, the question of whether there is a legal basis in IHRL for detentions carried out by NSAGs was addressed. After reiterating the understanding that the role of this legal framework is complementary to IHL, with recourse to the conflict avoidance approach, it was submitted that the legal basis for detention in

NIACs, in an international law perspective, should rest in with IHL. Nonetheless, as this area of international law is silent, the legal basis to detain remains in domestic law. Afterwards, the discussion proceeded to the legal basis for detention outside situations of armed conflict. In this subsection, it was explained that to be able to detain outside situations of armed conflict, a NSAG should have completely displaced the state authority, exercising government-like functions, maintaining public order and preventing violations against the civilian population by third parties.

Examples of such arrangements were presented, including the adoption of already existing laws and legal system put in place by the state, the enactment of a new set of laws and the formation of a new legal system in rebel-held territory. In addition to these possibilities, the adoption of religious law such as the *Shari'a*, or the adoption of traditional or customary practices that are recognised in the region were also explored. An important caveat is presented though. In the same manner that the state must comply with international legal standards, the rebel legislation, as well as the religious and customary norms must be respect article 9(1) of ICCPR, meaning that they must not be arbitrary. Finally, these same rules must respect the procedural safeguards laid down on IHL and following the principle of complementarity between this legal regime and IHRL, the other provisions in the ICCPR and other binding international instruments.

# Chapter 4 – Legal basis for prosecution

Much has been written regarding the legal basis for detention by non-state armed groups (NSAGs) both in and outside a Non-International Armed Conflict (NIAC). As evidenced by the first part of this chapter, the challenge of pinpointing the legal basis or determining its absence in case of prosecutions carried out by such organisations was nowhere near as explored. The issues with identifying a supposed authorisation for prosecution are somewhat similar to the those in identifying a legal basis for detention. These include an overlapping and at times conflicting framework and a lack of sufficient and unequivocal state practice and *opinio iuris* to create a set of customary norms.

The complete framework of criminal prosecutions by NSAGs, both as part of a NIAC and outside such situations, cover the fields of International Humanitarian Law (IHL), International Human Rights Law (IHRL) and International Criminal Law (ICL). These prosecutions can be divided, for didactical purposes, into prosecution of persons for war crimes; for violations of IHL not amounting to war crimes, both of them covering the judgment of members of their own armed groups; for crimes against humanity and genocide; for the prosecution of common criminality; as well as for the breach of a NSAG's disciplinary code.

It is important to highlight the role rebel groups play in resolving conflicts of a non-criminal nature, such as land disputes and family matters between the population under their control. Some organisations have even been known to create fairly developed and successful justice systems to address such disputes, or to rely on local customary norms and traditional courts.[1] Unfortunately, despite its importance,

[1] The are several examples of customary or rebel-made judicial systems, by way of example, see René Provost, 'FARC Justice: Rebel Rule of Law' (2008) 8 U.C. *Irvine Law Review* and more recently,

it is beyond the scope of this thesis to discuss the existence of a legal authorisation and the judicial guarantees involved in non-criminal trials by NSAGs.

### 1. Is there a legal basis for NSAG prosecution under IHL of NIAC?

As with the above discussion on the authorisation for detentions carried out by NSAGs, the scholarship presents a range of positions on the existence of a legal basis in international law for prosecutions conducted by rebel groups, albeit not in such an extensive manner. While on one extreme we find the view that IHL prohibits such conducts in any circumstance, on the other side of the spectrum, there are a few prominent analyses that conclude that IHL does, indeed, authorise such actions, in quite permissive forms.

This uncertainty in relation to the legality of said conduct when practiced by NSAGs derives to a great extent from the lack of clarity contained in the only two written norms on the subject, namely, Common Article 3 (CA3) and Additional Protocol II (APII). While CA3 states that sentencing and executions that are not handed down by a 'regularly constituted court', and respecting the judicial guarantees generally recognised as indispensable are prohibited;[2] the provisions contained in article 6 of APII, *grosso modo*, prohibit the sentencing and punishment of persons, unless when preceded by a judgement pronounced by a 'court offering the essential guarantees

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*Rebel Courts: The administration of Justice by Armed Insurgents* (Oxford University Press 2021); Björn Brenner, *Gaza under Hamas: from Islamic Democracy to Islamist Governance* (I.B. Tauris 2017), 144-146; Zachariah Mampilly, *Rebel Rulers: Insurgent Governance and Civilian Life during War* (Cornell University Press 2011), 201-203; Bert Suykens, 'Comparing Rebel Rule Through Revolution and Naturalization: Ideologies of Governance in Naxalite and Naga India' *in* Ana Arjona, Nelson Kasfir, and Zachariah Mampilly (eds), *Rebel Governance in Civil War* (Cambridge University Press 2015), 147-150; and Shane Joshua Barter, 'The Rebel State in Society: Governance and Accommodation in Aceh, Indonesia' *in* Ana Arjona, Nelson Kasfir, and Zachariah Mampilly (eds), *Rebel Governance in Civil War* (Cambridge University Press 2015), 234-235.

[2] Common Article 3(1)(d) to the Geneva Conventions of 1949.

of independence and impartiality'.[3] As will be seen, much of the discussion relating to the existence of a legal basis for prosecution, revolves around these two key expressions.

### *1.A. Against the existence of an authorisation to prosecute*

The majority of arguments against the legality of prosecutions conducted by NSAGs rely on the definition of the abovementioned expressions, i.e. 'a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples' in the case of CA3, and 'a court offering the essential guarantees of independence and impartiality' as per APII.[4]

Nevertheless, several scholars have opposed these rebel trials by positing that, instead of being unable to comply with the judicial guarantees required for a fair trial, this impossibility would stem from a prohibition under international law of such conduct. The heart of this argument seems to depend upon the absence of state practice and *opinio iuris*.[5]

In addition to highlighting the absence of state practice, proponents of this interpretation point out that, similarly to the above discussion on the existence of a legal basis for detentions, the drafters of the Geneva Conventions (GCs) did not intend to award both state and insurgents with the same rights under IHL. This inequality is even more evident, according to part of the scholarship, with the deletion, at the suggestion of the Pakistani delegation, of any reference that could be

[3] Article 6 (2), Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II). Geneva, 8 June 1977.
[4] These will be discussed in greater detail in Chapter 6 – Judicial Guarantees in Prosecution.
[5] For instance, see Denise Plattner, 'The penal repression of violations of international humanitarian law applicable in non-international armed conflicts' (1990) 30(278) *International Review of the Red Cross*, 415; and Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002), 74.

interpreted as granting equal rights or standing to NSAGs, so as nothing in APII should imply that *'dissidents must be treated legally other than as rebels'*,[6] which was supported by other delegations, such as Zaire's.[7]

This position, however, is anachronistic, especially considering some scarce, yet significant decisions. The U.S.'s Supreme Court decision in *Hamdan v. Rumsfeld*[8] is one such example, which indirectly legitimised NSAGs' courts by deciding that a regularly constituted courts should be based on domestic law, allowing for a possible future recognition of rebel courts established in accordance with government legislation.[9] The same could be said in relation to the two arrest warrants issued by the International Criminal Court (ICC) against Al-Werfalli,[10] which indicted a commander of the Al-Saiqa Brigade, operating in Libya, for the execution of detainees without providing them with due process. This decision allows for the interpretation that the indictee had the means to provide these individuals with the necessary fair trial guarantees, even in a trial conducted by a NSAG.

Finally, it must be noted the ground-breaking decision by the Stockholm's District Court in the case of Haisam Omar Sakhanh, who, as a member of Firqat Suleiman El-Muqatila, took part on the execution of ten detainees in the Idlib Provice of Syria. Of particular importance, the court considered the defendant guilty of executing the prisoners, who were deemed not to have received a fair trial, as the three-day lapse between their capture and their execution would not be enough for any adequate

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[6] Federal Political Department of Switzerland, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974-1977) – Volume VII* (Federal Political Department 1978), par. 11.
[7] *ibid.,* pars. 121-129.
[8] United States Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).
[9] Parth S. Gejji, 'Can Insurgent Courts Be Legitimate Within International Humanitarian Law?' (2012-2013) 91 *Texas Law Review*, 1536-1537.
[10] International Criminal Court, *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli, Warrant of Arrest* (Pre-Trial Chamber I), ICC-01/11-01/17, 15 August 2017; and *Second Warrant of Arrest* (Pre-Trial Chamber I), 4 July 2018.

judgement to have taken place. In this instance, the Swedish District Court decision was unprecedented for not only explicitly recognising the legal capacity of NSAGs to prosecute, but also for laying down a series of judicial guarantee requirements applicable in this context.[11] The decision of the Stockholm District Court was later upheld by the Appeals Court,[12] the Supreme Court of Sweden rejecting a leave to appeal, and consolidating the judgement as *res iudicata*.[13]

Additionally, it has been a long-established practice in international organisations, such as the United Nations, to issue resolutions urging all parties to a NIAC to respect IHL and to bring violators to justice.[14] While these manifestations are not sufficient to demonstrate a unified *opinio iuris* on the matter, and neither the abovementioned judicial decisions comprise a robust sample of state practice, to argue in favour of the crystallisation of this conduct as an international custom, they are significant enough to demonstrate that the contrary position – that argues for the existence of a prohibition on prosecutions by NSAGs – does not possess any basis on the existing international law framework.

A further argument could be proposed to counter this view. Considering that both CA3 and Article 6 of APII determine that executions or other forms of sentencing carried out without the necessary judicial guarantees are considered to be violations of IHL, it would be contrary to the general principles of effectiveness and good faith

[11] Stockholm District Court (*Prosecutor v. Omar Haisam Sakhanh*, Stockholms tingsrätt (Stockholm District Court), B 3787-16, 16 February 2017. For the English version of the decision, see On the Establishment of Courts in Non-international Armed Conflict by Non-state Actors (2018) 16(2) *Journal of International Criminal Justice*.
[12] Svea Appeals Court (*Prosecutor v. Omar Sakhanh Haisam Sakhanh*, Svea hovrätt (Svea Appeal Court), B 2259-17, 31 May 2017.
[13] Swedish Supreme Court (*Prosecutor v. Omar Sakhanh Haisam Sakhanh*, Högsta domstolen (Supreme Court of Sweden), B 3157-17, 20 July 2017.
[14] See, for example, United Nations Security Council, Res. 1479 (2003) on Côte d'Ivoire, par. 8; Res. 1509 (2003) on Liberia, par. 10; Res. 1962 (2010) on Côte d'Ivoire, par. 9; Res. 1933 (2010) on Côte d'Ivoire, par. 13; Res. 2041 (2012) on Afghanistan, par. 32; and Res. 2139 (2014) on Syria, par. 3.

to create obligations on both parties, that could be complied with by only one of them.[15] While this argument is not entirely correct, as it will be demonstrated below, it is certainly applicable in a scenario in which insurgent groups are prevented from prosecuting violators of IHL, while commanders in these groups could be criminally responsible for not punishing such conducts.[16]

### *1.B. Implicit authorisation under IHL*

On the other side of the debate, the proponents of the existence of an implicit authorisation for prosecutions undertaken by NSAGs under IHL seem to be, by far, the majoritarian current in the scholarship.[17] The arguments raised by this group of academics revolve in great part around a systemic interpretation of the existing legal framework, while also forwarding some arguments regarding the principle of equality of belligerents, as well as the perceived position of some delegates during the *travaux préparatoires* of the GCs and their Protocols.

One recent, yet very persuasive, argument that has been brought up in relation to the alleged existence of a legal basis for prosecution by NSAGs has been the existence of a customary IHL norm authorising both parties to a NIAC to conduct such procedures. No source reaffirming this position could be more authoritative than the updated commentary to the GCs, which states that, in addition to being

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[15] Jan Willms, 'Courts of armed opposition groups – a tool for inducing higher compliance with international humanitarian law?' *in* Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law – Lessons from the African Great Lakes Region* (Cambridge University Press 2015), 152. For a similar argument, see Jann Kleffner, 'The applicability of international…' *supra* at 24, 451.

[16] Article 28(a)(ii) and (b)(iii), Rome Statute of the International Criminal Court of 17 July 1998 Amended on 29 November 2010.

[17] See for instance, James Bond, 'Internal Conflict and Article Three of the Geneva Conventions' (1971-1972) 48 *Denver Law Journal*, 'Application of the Law of War to Internal Conflicts' (1973) 3 *Georgia Journal of International and Comparative Law*, *The Rules of Riot: Internal Conflict and the Law of War* (Princeton University Press 1974); Jonathan Somer, 'Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict' (2007) 89(867) *International Review of the Red Cross*; Sandesh Sivakumaran, and 'Courts of Armed Opposition Groups: Fair Trials of Summary Justice?' (2009) 7 *Journal of International Criminal Justice*.

important means to maintain law and order, as well as respect for IHL, NSAGs' courts are indispensable tools in the operationalisation of the doctrine of command responsibility, considering that commanders should be able to appropriately punish their subordinates for the commission of war crimes in order to avoid criminal responsibility themselves.[18] The commentary, remembering the provision that states that CA3 should be applied equally to all parties to the conflict, states that *'[if] Common Article 3 requires 'a regularly constituted court'. If this would refer exclusively to State courts constituted according to domestic law, non-State armed groups would not be able to comply with this requirement. The application of this rule in Common Article 3 to 'each Party to the conflict' would then be without effect.'*[19]

Not only this position is a radical change from the succinct commentary of 1952, which is limited to the general discussion of the risks of sentencing and carrying out of executions without a previous trial,[20] but it is also a very accurate synthesis of the arguments supporting the existence of an implicit legal basis for prosecution for NSAGs. Considering that the commentary seems to rely solely on UN Security Council resolutions urging all parties to the conflict to ensure respect for IHL,[21] the decisions on the ICC on the *Bemba Gombo* case,[22] a footnote in the UK Manual of

[18] International Committee of the Red Cross, *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949*: *Commentary of 2016 – Article 3: conflicts not of an international character* (ICRC 2016), pars. 689-690.
[19] *ibid.,* pars. 691-692.
[20] International Committee of the Red Cross, *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949: Commentary of 1952 – Article 3 – Conflicts not of an international character,*54
[21] United Nations Security Council, Res. 1479 (2003), *supra* at 14; Res. 1509 (2003), *supra* at 14; Res. 1962 (2010), *supra* at 14; Res. 1933 (2010), *supra* at 14; Res. 2041 (2012), *supra* at 14; and Res. 2139 (2014), *supra* at 14.
[22] International Criminal Court, *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (Pre-Trial Chamber II), ICC-01/05-01/08, 15 June 2009; and Judgment pursuant to Article 74 of the Statute (Trial Chamber III), ICC-01/05-01/08, 21 March 2016.

the Law of Armed Conflict,[23] as well as the European Court of Human Rights (ECoHR) case *Ilaşcu and others v Moldova and Russia*[24] (which, in turn, references another ECoHR case, *Cyprus v Turkey*),[25] it stands clear that the position adopted by the International Committee of the Red Cross (ICRC) in its updated commentary is *de lege ferenda*, failing to present more consistent evidence to attest its validity.

Regarding the first sustaining element, *i.e.* the numerous UN Security Council resolutions urging parties to NIACs to ensure respect for IHL provisions, as it was already explained above, these manifestations are not sufficient to demonstrate – by themselves – the crystallisation of an international custom authorising NSAGs to prosecute individuals on the basis of IHL. Due to their generic content, which does not specify the means by which respect for IHL should be enforced, these resolutions cannot even be considered to endorse prosecutions carried out in NSAG courts. This can be exemplified by the broad statements such as '[The Security Council] *[e]xpresses its strong concern about the recruitment and use of children by Taliban, Al-Qaida and other violent and extremist groups in Afghanistan* […] *reiterates its strong condemnation* […] *in violation of applicable international law and all other violations and abuses* […] *in situations of armed conflict*.'[26] Instead, as pointed above, these documents merely express the absence of an explicit prohibition on such conduct.

While it could be argued that the statement referred to in the UK Manual of the Law of Armed Conflict – which is made only obliquely when addressing the meaning of

[23] United Kingdom Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (2009 Oxford University Press), p. 404, fn. 94.
[24] European Court of Human Rights, *Case Ilaşcu and others v Moldova and Russia*, Application no. 48787/99, Judgement, 8 July 2004.
[25] European Court of Human Rights, *Case of Cyprus v Turkey*, Application no. 25781/94, Judgement, 10 May 2001.
[26] United Nations Security Council, Res. 2041 (2012), *supra* at 14.

the term 'law' in APII, being in itself more an argument on the definition of a regularly constituted court than on the existence of a rule of IHL authorising prosecution by NSAGs – is evidentiary of the United Kingdom *opinion iuris*, two arguments contesting such assertion should be considered. Firstly, assuming the text of the Manual does represent the established stance of the United Kingdom on the matter, and even that the country could be considered a specially affected state for the formation of this rule, its position alone fails to represent a generalised opinion for the purposes of a customary international law norm, even taking the *Hamdan v. Rumsfeld* case at the US Supreme Court, the two Al-Werfalli arrest warrants at the ICC, and the Haisam Omar Sakhanh case in Sweden, that were referred above. Secondly, the adoption of military manuals as manifestations of *opinio iuris* is a highly (and rightfully so) criticised practice. Despite being to some extent useful in analysing a state's official position, part of the scholarship defends that instead of expressing a proper legal position as an element of law-making, these manuals materialise policy considerations, and should not be taken into consideration by themselves.[27]

Perhaps the strongest arguments found in the updated commentary are the ones involving actual international case-law. The first of these jurisprudence pertains the case of Jean-Pierre Bemba Gombo, the Commander-in-Chief of the *Armée de Libération du Congo*, the military wing of the *Mouvement de Libération du Congo*, who was accused of failing to prevent or punish the commission of crimes against humanity of murder, and rape, as well as the war crimes of murder, rape, and

[27] For instance, Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict* (Oxford University Press 2016, 92-93; John Bellinger and William Haynes, 'A US government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*' (2007) 89(866) *International Review of the Red Cross*, 446-447; Charles Garraway, 'The Use and Abuse of Military Manuals' (2004) 7 *Yearbook of International Humanitarian Law*, 425, 440.

pillaging in the Central African Republic.[28] In the confirmation of charges against Bemba Gombo, the ICC found that, while a military commander for the purposes of article 28(a) of the Rome Statute,[29] the defender failed to take the necessary or reasonable steps to prevent or suppress such acts committed by his subordinates, even thought he possessed the means necessary to do so, including a functional military system to prosecute violators.[30] This position was later reaffirmed at the trial chamber, when the court found him guilty on all charges.[31] Despite being acquitted of all charges in the appeals chamber, due to serious errors committed by the trial chamber in assessing the measures adopted by the defendant to prevent or suppress his subordinates' crimes,[32] it is important to highlight that the decision laid an important precedent on the Court's approach to the issue of command responsibility and the existence of an obligation to prosecute by NSAGs.

In deciding whether Bemba Gombo had failed to punish his subordinates for the commission of crimes against humanity and war crimes, the court established that

[28] International Criminal Court, *Prosecutor v. Jean-Pierre Bemba Gombo,* Judgment pursuant to Article 74 of the Statute (Trial Chamber III), *supra* at 22

[29] '*Article 28*
*Responsibility of commanders and other superiors*
*In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:*
*(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:*
*(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and*
*(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.'*

[30] International Criminal Court, *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (Pre-Trial Chamber II)*, supra* at 22, par. 501.

[31] International Criminal Court, *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute (Trial Chamber III) *supra* at 22, pars. 205-209, 402-403, and 729.

[32] International Criminal Court, *Prosecutor v. Jean-Pierre Bemba Gombo,* Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute' (Appeals Chamber), ICC-01/05-01/08 A, 8 June 2018.

the obligation to repress included the obligation to prosecute the accused, or to hand them to competent authorities to carry out this prosecution,[33] including the established courts or a third state.[34] As can be seen by the decision of the Court, the obligation to suppress these violations under IHL is not limited to the prosecution by NSAGs, but also includes other possibilities such as the handing of the accused to governmental courts or even to third states. Regardless of the impracticality of the last two options, it is clear that the Court's understanding does not establish a single manner to comply with the obligations stemming from command responsibility.

The second precedent established by the Updated Commentary, the ECoHR decision in *Ilaşcu and others v Moldova and Russia*, which, in its turn is based on the previous decision by the Court in *Cyprus v. Turkey*, provides a strong argument for the recognition of established judicial systems outside governmental structures, by deciding that, although the terms 'court' and 'tribunal' found in the ECHoR[35] refer to a court establish by law, in some particular instances *'a court belonging to the judicial system of an entity not recognised under international law may be regarded as a tribunal "established by law" provided that it forms part of a judicial system operating on a "constitutional and legal basis" reflecting a judicial tradition compatible with the*

[33] International Criminal Court, *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute (Trial Chamber III) *supra* at 22, par. 208. This decision followed the precedent established consistently established by the International Court for the Former Yugoslavia, on decisions such as *Prosecutor v. Dario Kordić and Mario Čerkez*, Judgement (Trial Chamber), IT-95-14/2-T, 26 February 2001, par. 446; *Prosecutor v. Sefer Halilović*, Judgement (Trial Chamber I, Section A), IT-01-48-T, 16 November 2005, pars. 97, 100; *Prosecutor v. Sefer Halilović*, Judgement (Appeals Chamber), IT-01-48-A, 16 October 2007, par. 182.

[34] International Criminal Court, *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute (Trial Chamber III) *supra* at 22, *ibid.*, par. 206. This understanding is based on Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Kluwer 1987), par. 3538, in reference to Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I). Geneva, 8 June 1977. As explained in Chapter 2, Additional Protocol I, despite initial intentions, does not regulate non-international armed conflicts, providing only interpreting support to the provisions found in Additional Protocol I. As will be seen in Chapter 6, the adoption of Additional Protocol I standards to prosecutions carried out in non-international armed conflicts is neither accurate nor appropriate.

[35] In articles 5 and 6 respectively.

*Convention'*.[36] The case follows the previous understanding of the Court in *Cyprus v. Tukey*, when the Turkish Republic of Northern Cyprus' courts were considered to be established by law, despite the unrecognized claim of statehood of their government.[37]

Despite its importance in the debate on NSAG tribunals, this decision does not address the existence of an obligation on the part of these entities to establish courts, but merely analyses the possibility of such courts being considered to be established by law under IHRL. Notwithstanding the confusion between the existence of a legal authority and the constitutive elements of a tribunal established by law, as there is considerable overlap between both topics, it is important to highlight that these decisions refer to a very narrow set of situations, none of them applicable to CA3, which are courts established by NSAGs that have completely displaced state authority, and as such possessing limited international personality, and, as already mentioned above, under an IHRL framework.

When trying to determine the existence of this alleged implicit authorisation for armed group trials, part of the scholarship has resorted to the *travaux préparatoires* of the GCs and their Protocols, in particular the debates in the context of APII.[38] While there are no elements to analyse the rationale behind CA3(1)(d) on the Official Records of the 1949 Conference, the discussion on the provisions relating to prosecution found in APII provides important information.[39] The acceptance of the establishment of armed opposition courts by part of the delegates on the text of APII,

[36] European Court of Human Rights, *Case Ilaşcu and others v Moldova and Russia*, supra at 24, par. 460.
[37] European Court of Human Rights, *Case of Cyprus v Turkey*, *supra* at 25, pars. 231, 236-237.
[38] For example, Ezequiel Heffes, 'Generating Respect for International Humanitarian Law: The Establishment of Courts by Organised Non-State Armed Groups in Light of the Principle of Equality of Belligerents' (2015) 18 *Yearbook of International Humanitarian Law*, 192.
[39] Jonathan Somer, 'Jungle justice: passing…' *supra* at 17, 676-677.

considered to allow for an implicit authorisation for prosecution, is best summarised by the Nigerian delegate, Mr. Abdul-Malik, that considered that *'*[r]*ebels could certainly set up courts with a genuine legal basis* […] *It was only logical that if rebels could organize themselves sufficiently to observe the Protocols, and thereby enjoy their protection, they could also organize a recognizable body of law.'*[40] Additionally, it is important to recognise the support for this position in developments such as the amendment of Article 6(2) of APII, which replaced the expression 'regularly constituted' as found in CA3 to 'a court offering the essential guarantees of independence and impartiality', due to the recognition by experts that the adoption of the former terminology would make the establishment of courts by NSAGs impossible, being approved without any form of opposition.[41]

While these elements reflect a degree of acceptance to a norm authorising the setting up of courts by these groups, it is important to highlight that this was not the unified position during the conference, with delegates strongly opposing this position. For instance, the Argentinian Delegate, Mr. Torres Avalos, casted doubts to the acceptance of insurgent legislation, pointing that *'It was indeed unlikely, that a Government which was a party to a non-international conflict, would recognize the ideas of rebels as "national law"',*[42] while the Mexican delegation recognised that no clear conclusion was drawn from the debate on the scope of the term national law.[43] The provision containing the expression 'national law' and its application to NSAGs

[40] Federal Political Department of Switzerland, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974-1977) – Volume VIII* (Federal Political Department 1978), 360, par. 20.
[41] Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols… supra* at 34, par. 4600.
[42] Federal Political Department of Switzerland, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974-1977) – Volume IX* (Federal Political Department 1978), 314, par. 54.
[43] *ibid.* 318, par. 79.

was so contentions that, until the expression was changed to 'law', a group of delegations intended to remove the whole of sub-paragraph (2)(d) of article 6[44] (then article 10) in order to avoid allowing its application to NSAGs[45] As can be noted by the *travaux préparatoires*, the idea of rebel courts and legislation was unpopular among state delegates', and at no moment a conclusion was reached on their authorisation in APII.

Much of the discussion supporting an authorisation for prosecution in IHL, both during the debates on the Additional Protocols and posteriorly, relies on a very pertinent point, the application of the principle of equality of belligerents in NIACs.[46] While a discussion on the application of the principle of equality of belligerents may be outside the scope of this chapter, it is important to acknowledge the inherent problems in the application of this principle in NIACs, situations that challenge the traditional state-centric view of international law, and particularly IHL.[47]

While scholars that support trials by armed groups are correct in when they argue that the rules contained in CA3 and in APII should apply equally to all parties to the conflict, their argument – at least in regard to prosecutions – is moot. Bearing in mind all the evidence presented above, the better position seems to indicate that IHL of

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[44] *'Article 6 - Penal prosecutions*
*(…)*
*2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular:*
*(…)*
*(d) anyone charged with an offence is presumed innocent until proved guilty according to law*
*(…)'*

[45] Jonathan Somer, 'Jungle justice: passing…' *supra* at 17, 678.

[46] The principle of equality of belligerents determines that *'*(…) *IHL applies equally to all parties to an armed conflict and imposes the same obligations on them.'* Marco Sassòli, Antoine Bouvier and Anne Quintin, 'How does law protect in war – Equality of Belligerents (*International Committee of the Red Cross*, n.d.) < https://casebook.icrc.org/glossary/equality-belligerents> accessed 20 October 2019.

[47] For a detailed analysis on the dilemmas in the application of the principle of equality of belligerents in non-international armed conflicts and its consequences, see Jonathan Somer, 'Jungle justice: passing…' *supra* at 17, 659-664; and Adam Roberts, 'The Equal Application of the Laws of War: A Principle under Pressure' (2008) 90(872) *International Review of the Red Cross*, 931-962.

NIACs does not to allow nor prohibit such courts. Instead, this branch of international law only prohibits unfair trials, in violation of the conventional and customary judicial guarantees applicable,[48] as well as summary executions.[49] Under this perspective, the principle of equality of belligerents is no longer an issue when considering prosecutions in NIACs, as neither the state nor the armed group – or still, no armed group, in a NIAC fought between two or more NSAGs – possess authorisation to conduct trials under IHL, its legal basis existing only in domestic law.

The same can be said of the argument, raised by Kleffner, that considering the existence of the prohibition of summary executions, and the carrying out of trials in violation of the established judicial guarantees, there must be an implied authorisation for NSAGs to install all the judicial mechanisms to comply with these requirements.[50] While this argument is solidly based on the principles of contractual good faith and the principle of effectivity, positivised in international law by article 31(1) of the Vienna Convention on the Law of Treaties.[51] By allowing the legal basis for prosecutions; a necessary element for a fair prosecution, as well as for the compliance with the obligation to punish violations committed by subordinates; to be located in municipal law, IHL does not prevent the fulfilment of these obligations, allowing for the application of the norms found in CA3 and article 6 of APII.[52]

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[48] Louise Doswald-Beck, 'Judicial Guarantees under Common Article 3' *in* Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The Geneva Conventions: A Commentary* (Oxford University Press 2015), 490-492.
[49] Sandesh Sivakumaran, 'Courts of Armed Opposition Groups…' *supra* at 17, 496; Jonathan Somer, 'Jungle justice: passing…' *supra* at 17, 656-657; and Mark Klamberg, 'The legality of Rebel Courts during Non-International Armed Conflicts' (2018) 16(2) *Journal of International Criminal Justice*, 239-240.
[50] Jann Kleffner, 'The applicability of international…' *supra* at 24, 450-451.
[51] *'Article 31 – General Rule of Interpretation*
*1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'*
[52] Louise Doswald-Beck, 'Judicial Guarantees under…', *supra* at 48, 490.

## 2. Prosecuting without a legal basis

Much like the discussion in relation to detention by NSAGs, the legal basis for prosecutions by these actors is a subject that remained unregulated in IHL. Instead of creating an express prohibition or obligation, or yet, instead of providing an implicit authorisation as defended by part of the doctrine, the IHL of NIACs contains a permissive norm. By being merely a permissive authorisation, IHL of NIACs, at the same time, allows for domestic legislation to decide the applicable body of rules to this conduct, while not granting any form of legitimacy to courts, trials, legislation and armed groups themselves, despite the rather emphatic clarification that these conducts do not imply any kind of legitimisation of parties.[53] Considering this lack of an applicable framework for authorisation, prosecutions carried out both by states and NSAGs are to be subjected to the territorial state's domestic legislation, norms regulating the prosecution of internal conduct matters,[54] military manuals, the existing rules on judicial guarantees in IHL, as well as the applicable IHRL provisions.[55]

Nevertheless, it is worthwhile to notice that at the same time IHL is silent in relation to prosecutions in NIACs, the area has explicitly established prohibitions against the idea of 'summary justice',[56] which could be divided in punishments executed without a judicial process, and the carrying out of unfair prosecutions,[57] a formula that was

[53] As *per* Common Article 3(2), '[…] *The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.'*
[54] As proposed to non-state armed groups, although with different findings in relation to legal authorization, by Ezequiel Heffes, 'Closing a Protection Gap in IHL: Disciplinary Detentions by Non-State Armed Groups in NIACs' (3 July 2018) *EJIL: Talk!*.
[55] These will be discussed in Chapter 6.
[56] Jean Pictet (ed), *The Geneva Conventions of 12 August 1949 – Commentary – vol. I* (ICRC 1958), 54.
[57] Jennifer DePiazza, 'Denial of Fair Trial as an International Crime' (2017) 15(2) *Journal of International Criminal Justice*, 259, 262-278.

later adopted by both IHRL and ICL.[58] In this sense, while a prosecution carried out by a NSAG in accordance to the establish rules of fair trial is of no concern to IHL, summary executions and unfair trials are violations of IHL, and, when carried out systematically, may become a matter of ICL as war crimes.[59]

### 3. Is there a legal basis for NSAG prosecution under IHRL?

Even though the discussion on the legal basis for prosecution by NSAGs being relatively exiguous in comparison to the discussion of the legal basis for detention in the same context, examinations of NSAG prosecutions are even sparser under IHRL, consisting in a relatively new field,[60] especially considering the very narrow set of scenarios in which this legal *corpus* would be applicable. The discussion on the existence of an authorisation in IHRL for prosecutions in NSAG courts mirrors the discussion above in relation to detentions in the same context. While it is generally understood that IHRL regulates the relationship between states and individuals under their jurisdiction,[61] considering the current state of affairs in which NSAGs have, after completely displacing state authority over part of a given territory and maintaining stable control for a reasonable period of time, behaved like *de facto* states or *quasi*-states, it seems logical to extend the scope of application *ratione*

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[58] *ibid.*

[59] International Criminal Court, Elements of Crimes (as amended), 2 November 2000, ICC-ASP/1/3 (Pt II-B), UN Doc PCNICC/2000/1/Add.2, 34.

[60] Those are usually occur in the broader field of rebel governance, in particularly relevant pieces, such as Ana Arjona, *Rebelocracy: Social Order in the Colombian Civil War* (Cambridge University Press 2016); Ana Arjona, Nelson Kafir and Zachariah Mampilly (eds), *Rebel Governance in Civil War* (Cambridge University Press 2015); René Provost, 'FARC Justice: Rebel…' *supra* at 1*,* and 'Accountability for International Crimes with Insurgent Groups' *in* Morten Bergsmo and SONG Tianying (eds), *Military Self-Interest in Accountability for Core International Crimes* (2nd ed Torkel Opsal Academic EPublisher 2015); Zachariah Cherlan Mampilly, *Rebel Rulers – Insurgent Governance…, supra* at 1. Discussing more narrowly about the international human rights law perspective of non-state armed groups prosecution, see Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016), 206-236; Katharine Fortin, *'The Accountability of Armed Groups under Human Rights Law'* (Oxford University Press 2017), pp. 166-167; Michael Schoiswohl, '*De Facto* regimes and Human Rights Obligations: The Twilight Zone of Public International Law' (2001) 6 *Austrian Review of International and European Law*.

[61] Nigel Simon Rodley, 'Can Armed Opposition Groups Violate Human Rights?' in Kathleen Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-First Century* (Kluwer 1993), 308.

*personae* to include these particular entities (as can be seen in Chapter 2, section 2.**)**.[62]

In this sense, the question of the legality of prosecutions by NSAGs under IHRL transpires from a mere discussion on the legality of mobile courts convened by guerrillas deep in the jungle,[63] bordering on a debate on the legitimacy of unrecognised governments such as Hamas,[64] Somaliland,[65] and Islamic State of Iraq and the Levant.[66] In order for prosecutions to be carried out by entities such as these under a IHRL framework, it is necessary not only that a complete displacement of state authority, followed by the acquisition of pseudo international personality,[67] but also that such procedures to occur outside the context of a NIAC. Situations such as these involve the enforcement of law and order in a given rebel-held territory, where the *de facto* authorities would apply their own laws[68] or the legislation already in force by the government to administer justice in cases of common criminality.[69] These scenarios can be observed both during a NIAC, such as during the short-lived existence of the Islamic State as a territorial entity, as well as at the end of such

[62] As proposed by, among others, Andrew Clapham, 'Detention by Armed Groups in International Law' (2017) 93(1) *International Legal Studies*, 21-23; and Daragh Murray, *Human Rights Obligations…supra* at 60, 159.
[63] As was the concern of James Bond in 'Application of the Law…' *supra* at 17.
[64] A good example of this issue can be found in Björn Brenner, *Gaza under Hamas… supra* at 1, 141-169.
[65] Andre Le Sage, *Report: Stateless Justice in Somalia – Formal and Informal Rule of Law Initiatives* (Centre for Humanitarian Dialogue 2005) 26-28.
[66] Charles C. Caris and Samuel Reynolds, ISIS Governance in Syria (July 2014) *22 Middle East Security Report*, 18-19.
[67] Gus Waschefort, 'The pseudo legal personality of non-state armed groups in international law' (2011) 36 *South African Yearbook of International Law*; and Daragh Murray, *Human Rights Obligations…supra* at 60, 68.
[68] René Provost, 'FARC Justice: Rebel…' *supra* at 1, 33-36.
[69] Mark Klamberg, 'The legality of Rebel Courts…', *supra* at 49, 241-243.

conflicts, when the NSAG outlives the conflict without being able to overthrow the government or to be recognised as a new, independent, international actor.[70]

The need to maintain the order and stability in the benefit of the civilian population, be it by their own or by government laws, should not only be based on an IHRL compliant legislation, but also, in judicial guarantees previously established by this body of law and the resulting international case-law. Although performing functions generally attributed to states, the level of organisation and the resources available to even the most developed of those groups is usually much inferior to the former. With this in mind, it is important to recognise that, in order to achieve the goal of protecting the population under rebel rule, a gradual approach should be used in the enforcement of judicial guarantees, in a sliding-scale of obligations taking into account the level of organisation and capacity of these organisations, while preserving the essence of these norms.[71] This topic will be discussed in detail in chapter 6.

## 4. The meaning of a 'regularly constituted court' or a 'court offering the essential guarantees of independence and impartiality'

Probably the biggest hurdle in the development of a framework for prosecutions by armed NSAGs is the confusion surrounding the constitutive elements of a court in the terms of CA3(1)(d), and article 6(2) of APII. This confusion is further exacerbated if taking into account article 8(2)(c)(iv) of the Rome Statute. One of the declared objectives of the Additional Protocols to the Geneva Conventions (APs) is to *'*[develop] *and* [supplement] *Article 3 common to the Geneva Conventions of 12*

[70] See generally, Björn Brenner, *Gaza under Hamas: from Islamic Democracy to Islamist Governance* (I.B. Tauris 2017).
[71] Marco Sassòli, 'Introducing a sliding-scale of obligations to address fundamental inequality between armed groups and the state?' (2011) 93(882) *International Review of the Red Cross*.

*August 1949 without modifying its existing conditions of application'*,[72] being commonly understood as a clarification and expansion of the general provisions found in CA3. Nevertheless, the supplementary character and – considering the higher threshold of application of the Protocol – progressive nature of the document appears to conflict with the logic established in relation to the nature of the courts convened in NIACs.

Whereas in a NIAC regulated by CA3 provisions, a court, to be considered legal, must be a *'regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples'*,[73] courts convened in NIACs regulated by APII are required to offer *'the essential guarantees of independence and impartiality'*.[74] As can be verified by a cursory reading, the conditions established under CA3 are far more stringent than its APII counterpart. If taking in consideration the existing framework for NIACs, courts established under CA3, and requiring a lower level of organisation on the part of armed groups that parties to the conflict, should require less constitutive elements than those regulated by APII, which usually involve insurgent groups controlling territory in a stable manner, as well as possessing more resources and personnel.

The reason for this discrepancy seems to stem from the fears, manifested during the drafting of the APs, that the language used in CA3 might make the establishment of courts by NSAGs unlikely, as these groups might not have the capacity to comply with the legal requirements.[75] As a consequence, the ICRC proposed that instead, a

[72] Article 1(1), Additional Protocol II. For a similar text, see article 1(3), Additional Protocol I.
[73] Common Article 3(1)(d).
[74] Article 6(2), Additional Protocol II.
[75] Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols… supra* at 34, par. 4600; Sandesh Sivakumaran, 'Courts of Armed Opposition Groups…' *supra* at 17, 498; Parth S. Gejji, 'Can Insurgent Courts…' *supra* at 9, 1538-1539.

similar construction, based on article 84 of the Third Geneva Convention should be adopted; a solution that was unanimously accepted.[76]

It is important to note, however, that the ICRC's proposal was adopted only after the original proposal excluded a suggested reference to *'national or international law'*[77] in relation to judicial guarantees,[78] due to concerns of legitimisation and vagueness.[79] Additionally, such agreement was only possible after the ICRC delegate's reiteration that the article, which was draft article 10 at the time, was inserted in a context in which article 1 – that determined a higher scope of application in relation to CA3, requiring territorial control from NSAGs – had already been approved. This meant that this broader article would only be applicable to a limited number of NIACs.[80]

These developments show that, on one hand, there was a legitimate concern on the part of the drafters that NSAGs in need of applying the penal provisions of the Protocol would not be able to comply with the imposed obligations. On the other hand, there was sensible apprehension in relation to the provision, as it was seen to be unclear, and as consequence, it could potentially legitimise NSAG legislation. Therefore, to guarantee the survival of the provision during the drafting process, changes were implemented, that appear, at a first glance, to reverse the logic of supplementary nature of both provisions.

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[76] Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols… ibid.*

[77] Federal Political Department of Switzerland, *Official Records of the Diplomatic Conference…Volume VIII supra* at 40, 143-144.

[78] Which would in turn become article 6(2)(c) *'no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby'*.

[79] Jonathan Somer, 'Jungle justice: passing…' *supra* at 17, 678.

[80] *ibid.,* 677.

This apparent confusion was compounded with the drafting of the Rome Statute of the ICC, which, by determining that in order to avoid international criminal responsibility for the commission of the war crime of sentencing or execution without due process, judgements must be pronounced by a *'regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable'*.[81] Initially, the language of the provision seems to follow the standards set in CA3. Contrasting with the apparent position adopted by the Statute, the Elements of Crimes, when interpreting the norm, consider the expression *'not regularly constituted'* as meaning that the court *'did not afford the essential guarantees of independence and impartiality, or the court that rendered judgement did not afford all other judicial guarantees generally recognized as indispensable under international law'*.[82]

The explanation of the article clearly confuses the notion of legal basis – *i.e.* whether the court was set up under the appropriate legislation,[83] which precludes any analysis of the manner in which the court conducts its trials – with the idea of judicial guarantees.[84] Additionally, the use of the expression *'essential guarantees'*, instead of *'indispensable'*, strongly points to the idea that, despite referencing the definition found in CA3, the content of the obligation found in article 8(2)(c)(iv) of the Rome Statute actually refers to article 6(2) of APII.

Despite this apparent connection to APII, Klamberg proposes that, instead, the drafters of the Statute of the ICC aimed at article 75(4) of Additional Protocol I

[81] Article 8(2)(c)(iv), Rome Statute…, *supra* at 16.
[82] International Criminal Court, *Elements of Crimes, supra* at 59, 34.
[83] Sandesh Sivakumaran, 'Courts of Armed Opposition Groups…' *supra* at 17, 506-507.
[84] Jonathan Somer, 'Jungle justice: passing…' *supra* at 17, 674-675; Jan Willms, 'Courts of armed opposition groups…' *supra* at 15, 154.

(API),[85] basing this hypothesis on the idea that the aforementioned article shares the terminology 'regularly constituted' with CA3.[86] The author draws a parallel between article 75(4) of APII (and by extension, article 8(2)(c)(iv) of the Rome Statute) with the judicial guarantees contained in IHRL instruments such as the International Convention on Civil and Political Rights (ICCPR) and the ECHoR, adding that, in accordance to Zimmerman and Greiss, NSAGs would be barred from establishing *ad-hoc* courts, which in turn would reinforce the relationship between the provision in API and CA3.[87]

Despite its convincing arguments, Klamberg's theory is incorrect, as it fails to analyse the context and the drafting history of the Rome Statute's norm. Bearing in mind that the provisions in the APs serve the purpose of supplementing the norms in

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[85] *'Article 75 -- Fundamental guarantees*
*(…)*
*4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:*
*(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;*
*(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;*
*(c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;*
*(d) anyone charged with an offence is presumed innocent until proved guilty according to law;*
*(e) anyone charged with an offence shall have the right to be tried in his presence;*
*(f) no one shall be compelled to testify against himself or to confess guilt;*
*(g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
*(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;*
*(i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and*
*(j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.*
*(…)'*

[86] Mark Klamberg, 'The Legality of Rebel Courts…' *supra* at 49, 248.

[87] *ibid.*

CA3, it rests clear that, following the requirement of a 'regularly constituted court' in the latter document, which do not cease to apply in conflicts regulated by the APs, the prohibition of *ad-hoc* courts would still exist, even under APII. Moreover, the argument that article 8(2)(c)(iv) follows API in its intent to replicate the IHRL framework of judicial guarantees, is incorrect.

The threshold of application of the provision in the Rome Statute is inferior to the one found in APII – being an incorrect reproduction of the threshold for CA3 as established in the *Tadić* judgement in the International Criminal Tribunal for the Former Yugoslavia (ICTY), as seen in Chapter 2, section 1.B.3. –[88] and by extension inferior to the very high standards set in API. Consequently, the differentiation between judicial guarantees, instead of pointing towards a convergence between article 8(2)(c)(iv) with article 75(4) of API, indicates a relationship between the guarantees found in CA3, which are further developed in article 6(2) of APII. The disparity between the judicial guarantees found in ICCPR and the article 6(2) of APII, is notable, but not exclusive, to the right of appeal. This marked disparity was not accidental, as not requiring standards equal to those found in ICCPR, particularly in its article 14, would prevent imposing the obligation on NSAGs to organise a judicial system that is more complex than what can be expected of such groups.[89]

Finally, the argument that the norm on the Rome Statute borrows from API completely overlooks the drafting history of the Statute itself. During the drafting of article 8(2)(c)(iv), three proposal for the final text were presented: one from the

[88] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012), 193. For a more detailed explanation, see Sandesh Sivakumaran, 'Identifying an Armed Conflict Not of an International Character' *in* Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009).
[89] Michael Bothe, Karl Joseph Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd ed Martinus Nijhoff Publisher 2013), 747.

United States, following closely the elements from article 8(2)(a)(vi) applicable to International Armed Conflicts (IACs), a proposal from the Swiss delegation providing a list of indispensable judicial guarantees borrowing from the GCs and article 6 of APII, and a Belgian proposal with a clearer distinction between the three hypotheses in which the passing of sentences and carrying out of executions would be considered a war crime.[90] As stated in the Belgian proposal, the passing of sentences and the carrying out of executions would be considered war crimes when *'*(…) [e]*ither no previous judgement was pronounced, or the previous judgement was not pronounced by a regularly constituted court or did not afford all judicial guarantees which are generally recognized as indispensable.'*[91] The similarities between this proposal and the final version of the Elements of Crimes are striking, suggesting, similarly, a confusion in relation to the threshold of application of the Statute to NIACs, a confusion in the reproduction of the Belgian definition, the final version equating regular constitution to judicial guarantees, instead of differentiating between both elements.

Despite the clarification on the scope of the norm found in the Statute of the ICC, the architectural problems found in the penal provisions relating to NIACs remain, with many alternatives being proposed in an attempt to create a coherent and progressive framework for the application of the discussed IHL norms, particularly taking into account the precarious situation of NSAGs.

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[90] Eva La Haye, 'Violations of Common Article 3' *in* Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001), 212.

[91] Preparatory Commission for the International Criminal Court, *Proposal by Belgium concerning article 8, paragraph 2 (c) (iv) of the Statute of the International Criminal Court*, PCNICC/1999/WGEC/DP.13, 28 July 1999.

### *4.A. Harmonisation attempts*

As previously mentioned, the difficulty in defining the legal basis for the establishment of courts by NSAGs in NIACs does not lay so much in the acceptance of the applicability of CA3 and article 6 of APII to insurgent groups. Instead, considering that the legal basis for conveying courts in NIACs is to be found in domestic legislation, the challenge to the application of the abovementioned norms, specifically by NSAGs, consists in harmonising the ideas of a *'regularly constituted court'* and of courts *'offering the essential guarantees of independence and impartiality'* with the inherent lack of legal authority of these entities.

The position that the expression 'regularly constituted court' should be interpreted, in light of IHRL provisions, as *'regularly constituted within the meaning of national legislation'* or even as *'established by law'*, although minoritarian, still finds its supporters among the scholarship.[92] Under this perspective, the requirement in CA3, and by extension of article 6 of APII considering the more stringent character of the Protocol provisions, should be analysed in comparison to article 14(1) of the ICCPR. In particularly, this comparison should be made with the provision that determines that: *'*(…) *everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.* (…)*'*.[93] In this sense, although the idea of a tribunal might deviate from the conventional national courts, it still must be – among other requirements – 'established by law', with the latter expression being interpreted narrowly to mean a parliamentary statute or other form of positive

[92] For instance, see Anne-Maria la Rosa and Carolin Wuerzner, 'Armed groups, sanctions and the implementation of international humanitarian law' (2008) 90(870) *International Review of the Red Cross*, 340; Manfred Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (2nd rev ed N.P. Engel 2005), 319-321; and Amnesty International, Amicus Curiae *observation on superior responsibility submitted pursuant to rule 103 of the rules of procedure and evidence* (Pre-Trial Chamber II), ICC-01/05-01/08, 20 April 2009, pars. 22-23.

[93] Article 14, International Covenant on Civil and Political Rights (ICCPR). 16 December 1966.

law enacted by the legislative branch of the government, or yet, an equivalent unwritten or common law norm, establishing said court and defining its subject-matter and territorial jurisdiction.[94]

Despite providing the most stringent set of judicial guarantees, this position suffers from an irredeemable flaw. Setting such a high requirement for the establishment of NSAG courts, proponents of this position fail to recognise the risks associated with setting such unattainable standard. By creating a norm that cannot be respected, IHL would be, instead of encouraging the respect for fair trials, incentivising summary executions in NIACs. This only makes sense if taking into account that the expenditure of resources for pre-trial detentions and the handing of sentences is incomparably superior to that of summary executions, with the exact same outcome under IHL, *i.e.* a violation of IHL and/or the commission of war crimes.

This is even more evident if considering the obligation of commanding officers to prevent or repress the commission of war crimes, a situation in which NSAGs are bound by an obligation which they are objectively incapable of complying with.[95] Instead, it appears that a better interpretation of article 14(1) of ICCPR in relation to NSAGs would be one that could be reasonably operationalised at the domestic level by *'each Party to the conflict'*.[96]

This approach is not novel and has been used by international courts, notably in the case at the ICTY in *Tadić*, in which the compatibility of the Court with abovementioned article 14 of ICCPR was analysed, with the conclusion that

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[94] Manfred Nowak, *U.N. Covenant on Civil… supra* at 92*,* 319.
[95] On this point see Andrew Clapham, 'Detention by Armed Groups…' *supra* at 62, 19. A similar point that made in relation to the international dimension of the legal basis for prosecution but that can be applied perfectly to its domestic dimension was made by Jann Kleffner, 'The applicability of international…' *supra* at 24, 450-451.
[96] As per Common Article 3.

> *'*(…) *This interpretation of the guarantee that a tribunal be "established by law" is borne out by an analysis of the International Covenant on Civil and Political Rights. As noted by the Trial Chamber, at the time Article 14 of the International Covenant on Civil and Political Rights was being drafted, it was sought, unsuccessfully, to amend it to require that tribunals should be "pre-established" by law and not merely "established by law"* (…) *The important consideration in determining whether a tribunal has been "established by law" is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and should that it observes the requirements of procedural fairness.* (…) *This concern about ad hoc tribunals that function in such a way as not to afford the individual before them basic fair trial guarantees also underlies United Nations Human Rights Committee's interpretation of the phrase "established by law" contained in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. While the Human Rights Committee has not determined that "extraordinary" tribunals or "special" courts are incompatible with the requirement that tribunals be established by law, it has taken the position that the provision is intended to ensure that any court, be it "extraordinary" or not, should genuinely afford the accused the full guarantees of fair trial set out in Article 14 of the International Covenant on Civil and Political Rights.*[97]

This change of focus from a (state-centric) legal basis to the essential judicial guarantees to be afforded by such tribunals has been the dominant view, particularly in relation to NSAGs, being reproduced by international organisations. A notable example is the UN, when, via its Commission of Inquiry for Libya, recommended that the Libyan National Transitional Council

> *'conduct exhaustive, impartial and public investigations into all allegations of international human rights law and international humanitarian law violations, and in particular to investigate with a view to prosecuting cases of extrajudicial, summary or arbitrary executions and torture with full respect of judicial guarantees'*[98]

Or when its Security Council called upon the *Rassemblement Congolais pour la Démocratie* (RCD-GOMA) to take all the necessary measures to bring perpetrators

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[97] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, par. 45.
[98] United Nations Human Rights Council, *Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya*, A/HRC/17/44, 1 June 2011, par. 269.

to justice.[99] It is important to highlight that, even among those that defend the objective illegitimacy of NSAGs to convene courts, in order *'*[t]o *avoid requesting the impossible* (…)*'*, the need to consider measures to allow these groups to comply with the requirements of fair trial is recognised.[100]

As already mentioned above, the majoritarian position in relation to the interpretation of the IHL provisions relevant to the establishment of NSAG courts, as well as their ICL counterpart found in the Rome Statute, proposes a shift in the interpretation of the expression 'regularly constituted'. This shift would steer the discussion from requirements that could only be reasonably expected to be complied with by states, to the more functional interpretation found in article 6(2) of APII, as well as article 8(2)(c)(iv) of the Rome Statute.[101] This relativisation, although mainly an academic theory, has been followed by a few important judicial decisions, both in international and domestic courts, as well as other forms of practice, which could be seen as the beginning of a move by the international community's perspective towards accepting, to some extent, the role of NSAGs, and more broadly, rebel governance.

Although envisioned by the drafters of the GCs, who were careful enough to include 'each Party to the conflict' to the obligations found in CA3 instead of 'the High Contracting Parties' or a similar expression, the problems faced by NSAGs while carrying out sentences handed down by their own courts were apparently ignored during the drafting of the Conventions and in the years after their adoption.

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[99] United Nations Security Council, *Statement by the President of the Security Council*, S/PRST/2002/22, 23 July 2002, 1.

[100] Anne-Maria la Rosa and Carolin Wuerzner, 'Armed groups, sanctions…' *supra* at 92, 340.

[101] For instance, see James Bond, 'Application of the Law…' *supra* at 17; Jonathan Somer, 'Jungle justice: passing…' *supra* at 17; Sandesh Sivakumaran, 'Courts of Armed Opposition Groups: Fair Trials or Summary Justice?' (2009) 7 *Journal of International Criminal Justice*; Jan Willms, 'Courts of armed opposition groups… *supra* at 15; Ezequiel Heffes, 'Generating Respect for International Humanitarian Law: The Establishment of Court by Organized Non-State Armed Groups in Light of the Principle of Equality of Belligerents' (2015) 18 *Yearbook of International Humanitarian Law*; and Mark Klamberg, 'The Legality of Rebel Courts…' *supra* at 49.

Jean Pictet, when analysing CA3(1)(d) in the famous original Commentaries to the GCs, limited his considerations to 'summary justice'. This term should be understood as summary executions and executions carried out as consequence of a swift trial, that denies the defendant their fair trial guarantees, and the right of states to prosecute detained violators of IHL, while ignoring the NSAG's perspective completely.[102] It was not until later that the first concerns regarding the applicability of the norm to insurgent courts started to emerge.

Perhaps the first prominent analysis on the matter was made by James Bond, addressing NSAG courts that do not possess territorial control, in a pre-APII scenario.[103] In what is now a famous quote, Bond reasoned that the expression 'regularly constituted court', when applied to NSAGs, should be considered with a degree of flexibility, as *'*[g]*uerrillas, after all, are not apt to carry black robes and white wigs in their back packs. Any proceeding they convoke will necessarily be ad hoc'*.[104] While problematic in its vagueness – as his reasoning was based on authoritativeness, meaning that appropriate authorities, vested with appropriate powers, could create courts with appropriate standards –[105] the rationale behind the idea of not construing 'regularly constituted court' too literary was valuable. His proposal was helpful in the sense that it recognised the inherent inequality between states and NSAGs in a NIAC, as well as the necessity to adapt the rules on prosecution to the reality of armed groups in order to avoid summary executions and unfair trials.

[102] Jean Pictet (ed), *The Geneva Conventions… vol. I supra* at 56, 54.
[103] James Bond, 'Application of the Law…', *supra* at 17.
[104] *ibid.*, 372.
[105] *ibid.*

The concept of appropriateness and the recognition of the existing gap between states and NSAGs in NIACs propelled the debate and generated a series of theories that became progressively less vague in comparison to Bond's, particularly with the drafting of the Additional Protocols to the GCs and the Rome Statute of the ICC.

*4.A.1. Equality of belligerents in NIACs*

The idea of the disparity between parties to the conflict eventually turned into a discussion on the actualisation of the principle of equality of belligerents to the context of NIACs, particularly relating to prosecutions. Considering that the relationship between states and NSAGs in NIACs is vertical rather than horizontal (as is the case in IACs), the applicability of the principle of equality of belligerents is *a priori* difficult.[106]

While CA3, with its provisions binding 'each Party to the conflict' seemed to allude to this idea, even if obliquely, during the drafting of APII, the concern that some provisions of the Draft Protocol *'treat*[ed] *a sovereign state and a group of insurgent nationals, a legal Government and a group of outlaws, a subject of international law and a subject of domestic law, on an equal footing'*[107] caused Draft Article 5, which explicitly stated that *'The rights and duties of the parties to the conflict under the present Protocol are equally valid for all of them'*[108] to be removed, as an attempt by the Pakistani delegation to save the Protocol.[109] As a result, the idea that all parties to APII are bound by the same obligations and are afforded the same rights could be

[106] Jonathan Somer, 'Jungle Justice: passing…' *supra* at 17, 659-660.
[107] This was the position of Mr. Bintu, a delegate from Zaire. Federal Political Department of Switzerland, *Official Records of the Diplomatic Conference… Volume VIII supra* at 40, 229, par. 124.
[108] Federal Political Department of Switzerland, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974-1977) – Volume I* (Federal Political Department 1978), 34.
[109] Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims… supra* at 89, 695, par 7.

contested.[110] Despite this, it is reasonably submitted that all parties to a conflict must be bound by the same IHL duties, the binding force affecting the parties, particularly NSAGs, varying depending on the scholar's point-of-view.[111] The current work adopts the prescriptive jurisdiction theory in both its domestic and international categories.

By imposing the exact same rules to both sides of NIAC, IHL would then impress an unequal system, in which NSAGs would be severely disadvantaged in comparison to recognised states. The solution proposed by these theorists relies on the adaptation of the principle of equality of belligerents. To some, by recognising non-state *praxis* and *opinio iuris* in the formation of customary IHL,[112] or by adopting the concept of parity, in the sense of a general equality of status that exists between states in international law,[113] in opposition to the principle of equality, in the sense of *'equal rights and obligations flowing from international law norms regulating the subject matter of IHL'*,[114] it would be possible to interpret the existing framework applicable to NIAC under a more 'rebel-accessible' light, and consequently allowing for NSAG compliance even in the most complex situations, such as in the case identifying of a legal basis for prosecution.

While a debate on the role of NSAGs on the construction of IHL, and more broadly, of international law, could greatly contribute to the development of a more grounded regime of international law, particularly taking into consideration the growing prominence of these actors in the international arena, the debate on equality of

[110] Jonathan Somer, 'Jungle Justice: passing…' *supra* at 17, 661.
[111] *ibid.,* 661-662; Ezequiel Heffes, 'Generating Respect…' *supra* at 101, 187-188.
[112] Such as Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law' (2010) 1(1) *International Legal Studies*, 13; Ezequiel Heffes, *ibid.*; and referring to this approach, Jonathan Somer, 'Jungle Justice: passing…' *supra* at 17, 661-662.
[113] Jonathan Somer, 'Jungle Justice…', *ibid.*, 663.
[114] *ibid.*

belligerents is moot in the ambit of criminal prosecutions. When involved in a NIAC, NSAGs that are not vested with limited international legal personality are subjected to IHL via domestic prescriptive jurisdiction. In these situations, when IHL is silent (such as in the case of the legal basis for criminal prosecutions) the applicable legal framework should be the one found in domestic law. Considering that, while IHL does recognise the principle of equality of belligerents in NIACs, it does not possess the efficacy to impose the principle to domestic legislation,[115] thus, while compliance problems in relation to some provisions applicable in NIACs do exist, these are beyond the scope of IHL.

*4.A.2. Customary international law*

In a somewhat complementary way to the idea of the loosening of the legal basis in light of the principle of equality of belligerents, the proposal that the legal basis for prosecutions carried out by NSAGs could be based on existing customary international norms applicable to NIACs is a popular alternative among scholars.

Bearing in mind the idea that NSAGs should contribute to the creation of international custom, the practice of such entities in setting up their own courts and creating their own legislation should be taken into account when considering the scope of the legal requirement in the expression 'regularly constituted court', as proposed by the Commentary to the GCs.[116] This position seems to possess some limited support, as seen, for example, in the arguments of the Nigerian delegate at the Diplomatic Conference of 1974-1977, that proposed that '[r]*ebels could* certainly *set up courts with a genuine legal basis* […] *they could also organize a recognizable*

[115] Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law – Volume I: Outline of International Humanitarian Law* (3rd ed ICRC 2011), Part I – chapter 2, 21.
[116] Jean Pictet (ed), *The Geneva Conventions… vol. I supra* at 56, 54.

*body of law'*.[117] This is also verified in the UK Manual of the Law of Armed Conflict, that recognises this possibility in a footnote. [118] In a more recent development, the ICRC's Updated Commentary to the GCs seemed to have adopted this idea,

> *'Common Article 3 requires 'a regularly constituted court'. If this would refer exclusively to State courts constituted according to domestic law, non-State armed groups would not be able to comply with this requirement. The application of this rule in Common Article 3 to 'each Party to the conflict' would then be without effect. Therefore, to give effect to this provision, it may be argued that courts are regularly constituted as long as they are constituted in accordance with the 'laws' of the armed group. Alternatively, armed groups could continue to operate existing courts applying existing legislation'*[119] (footnote omitted)

At a first glance, this (very welcomed) development unequivocally clarifies the much-debated issue on the expression 'regularly constituted court' that has existed in international law for the last sixty years, but, upon a deeper analysis, it seems clear that this change of policy is more an expression of *lex ferenda* than a position adopted based on existing customary international law. When reading through the footnotes of the commentary on CA3,[120] it is possible to find, in relation to the sources used for the abovementioned statement, that *'Therefore, to give effect to this provision, it may be argued that courts are regularly constituted as long as they are constituted in accordance with the 'laws' of the armed group'*. One can verify that, from these sources, six of them are,[121] in the words of the International Court of

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[117] Federal Political Department of Switzerland, *Official Records of the Diplomatic Conference…Volume VIII supra* at 40, 360, par. 20.
[118] United Kingdom Ministry of Defence, *The Joint Service Manual… supra* at 23*,* 404, fn. 94.
[119] International Committee of the Red Cross, *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949*: *Commentary of 2016 – Article 3: conflicts not of an international character* (2016), par. 692.
[120] *Ibid.*, fn 595.
[121] James Bond, 'Application of the Law…', *supra* at 17, 327; Sandesh Sivakumaran, 'Courts of Armed Opposition Groups…' *supra* at 101, 499-500, and *The Law of Non-International… supra* at 88, 306; Jonathan Somer, 'Jungle Justice: passing…' *supra* at 17, 687-689; Jan Willms, 'Justice through Armed Groups' Governance – An Oxymoron?' (2012) 40 *SFB-Governance Working Paper Series*, 6; and Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims… supra* at 89, 746.

Justice, *'teachings of the most highly qualified publicists of the various nations'*,[122] one could be considered a piece of national legislation (the abovementioned reference on the UK Manual of the Law of Armed Conflict), and lastly, one is a decision from the ECoHR.[123]

A detailed analysis of these six sources indicate that three of them have a clear *de lege ferenda* character, not referencing any source for their claims aside from the authors' own interpretation. Despite being very insightful and opportune in the greater debate on the subject, these analyses carry, in the end, little weight in the qualification of this interpretation as being reflective of customary international law or any kind of positive law. Additionally, it is also possible to verify that in some cases these documents have adopted a somewhat circular referencing, in which a source is mentioned by another source, which, in turn, mentions the latter. Finally, it is possible to identify that some of the other referenced scholarship does not intend to portrait this construction as an accepted fact, but merely as an aspirational theory.[124]

An additional academic source notes that *'[t]here is no basis for the concept that the rebels are prevented from changing the legal order existing in the territory where they exercise factual power'*.[125] This statement is problematic for the Updated Commentary for a couple of reasons. Firstly, as already discussed in relation to the existence of legal bases in IHL for both detention and prosecution, the lack of a

[122] Statute of the International Court of Justice, article 38(1)(d).
[123] European Court of Human Rights, *Case Ilaşcu and others v Moldova and Russia*, supra at 24, para. 460.
[124] James Bond, 'Application of the Law…', *supra* at 17; Jonathan Somer, 'Jungle Justice: passing…' *supra* at 17; Jan Willms, 'Courts of armed opposition groups… *supra* at 15; Sandesh Sivakumaran, 'Courts of Armed Opposition Groups…' *supra* at 101, and *The Law of Non-International… supra* at 88. Sivakumaran's articles being the exception, as they reference the aforementioned position of the Nigerian Delegate, and Amnesty International, Amicus Curiae *observation on superior responsibility submitted pursuant to rule 103 of the rules of procedure and evidence* (Pre-Trial Chamber II), ICC-01/05-01/08, 20 April 2009, pars. 22-23.
[125] Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims… supra* at 89, 746.

prohibition does not imply an authorisation. Consequently, by stating that there is no basis for the claim that NSAGs cannot create their own legislation, the authors are merely stating that the creation of such laws would not be, in themselves, a prohibited act under IHL, although it would certainly be so under domestic law.

The second problem with this statement is that, by determining that such acts are not prohibited '*in the territory where they exercise factual power'* the authors imply that i) there is a prohibition to changes in the legal order in areas in which these NSAGs do not possess exclusive territorial control; and ii) by linking the possibility of changing the legal order to the idea of possessing exclusive territorial control, the debate is then moved from the existence of a legal basis in IHL or domestic law to the acquisition of international legal personality by these groups. In case they are indeed granted limited international legal personality, the question of legal authorisation ceases to be a problem, since they are consequently allowed to perform *quasi*-state-like functions that are inherent to the acts that they are *de facto* performing, including in this case, legislating in relation to prosecutions, under IHL, IHRL, ICL.[126]

Regarding the remaining sources mentioned by the Updated Commentary, the position of the Nigerian delegation at the 1974-1977 Diplomatic Conference[127] cannot be construed as the unanimous opinion among delegates, as many other delegations – most notably the Argentinian –[128] were strongly against the idea of conferring such powers to NSAGs. In the end, the outcome of the discussion was, in the words of Mr. de Icaza for the Mexican delegation, *'*[h]*is delegation had abstained*

[126] Roland Portmann, *"Legal Personality in International Law"* (Cambridge University Press 2010), p. 83.
[127] Federal Political Department of Switzerland, *Official Records of the Diplomatic Conference…Volume VIII supra* at 40.
[128] Federal Political Department of Switzerland, *Official Records of the Diplomatic Conference… Volume IX supra* at 42, 314, par. 54.

*from voting on paragraph 2 (c) of new article 10, because the notion of 'national law" was vague, and no clear idea of it had emerged from the debate'.*[129]

The evidence provided by the UK Manual of the Law of Armed Conflict could, indeed, be evidence of *opinio iuris*, but, as explained by Hill-Cawthorne, the use of military manuals should not be overstated in the construction of customary international law, as these documents more often than not point to domestic obligations or, as it is in the present case, to policy decisions.[130]

Finally, the case-law provided, Ilaşcu and others v. Moldova and Russia at the ECoHR, concerns a case in which the applicants were prosecuted by the 'Supreme Court of the Moldavian Republic of Transdniestria' and were found guilty of offences against national security, organisation of activities with the aim of committing extremely dangerous offences against the state, murdering a representative of the state with the aim of spreading terror, premeditated murder, unlawfully requisitioning means of transport, deliberate destruction of another's property and illegal or unauthorised use of ammunition or explosive substances. The applicants were sentenced to imprisonment with hard labour, one of them being sentenced to death, their property also being confiscated.[131]

As mentioned above in relation to the exercise of exclusive territorial control, in cases such as this, *i.e.* sentencing by a NSAG exercising *de facto* state-like functions, the recognition of international legal personality permits the establishment of courts based on their 'domestic law'. The example in question is a particularly

[129] *ibid,* 318, par. 79.
[130] Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 27, 92. Also, see Charles Garraway, 'The Use and Abuse…' *supra* at 27, 425, 440.
[131] European Court of Human Rights, *Case Ilaşcu and others v Moldova and Russia*, supra at 24, par. 212-219.

extreme one of an organised NSAG, as the Pridnestrovian Moldavian Republic is a non-recognised state, maintaining strong economic ties not only with Moldova but also with the European Union, as well as engaging politically with these international entities and others such as NATO.[132] In this case, the Court found that

> *'a court belonging to the judicial system of an entity not recognised under international law may be regarded as a tribunal "established by law" provided that it forms part of a judicial system operating on a "constitutional and legal basis" reflecting a judicial tradition compatible with the Convention, in order to enable individuals to enjoy the Convention guarantees.'*[133]

This indicates that an operative judicial system and a form of parliament should be in place to allow for the prosecutions to occur under IHRL. This understanding is similar to a preceding case also at the ECoHR, Cyprus v. Turkey.[134]

If taken in consideration, the assessment made at Updated Commentary does not point to any established norm, be it customary or positive, even after considering more recent developments such as the decision at the Swedish Courts in the case of Omar Haisam Sakhanh (which will be analysed below). Neither can the claim that non-state practice supports the creation of customary international law as suggested by these authors.[135] That is not to say though, that the recognition of NSAGs is unimportant to the development of international law, or that the debate on the matter is settled. As explained by Sassòli, one of the main mechanisms for achieving compliance from NSAGs is to develop a sense of ownership in relation to the norms

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[132] Reggie Kramer, 'Transnistria Primer' (Foreign Policy Research Institute, 3 October 2016) <https://www.fpri.org/article/2016/10/transnistria-primer/> accessed 12 November 2019.
[133] European Court of Human Rights, *Case Ilaşcu and others v Moldova and Russia*, supra at 24, par. 460.
[134] European Court of Human Rights, *Case of Cyprus v Turkey*, *supra* at 25, pars. 236-237.
[135] For instance, see Ezequiel Heffes, 'Generating Respect…' *supra* at 101, 193, refencing the Second Report by the International Law Commission of 2014; also, UN General Assembly, *International Law Commission: Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties by Georg Nolte, Special Rapporteur*, UN Doc. A/CN.4/671, 26 March 2014, par. 42.

to which they are bound, which in turn has the potential not only to increase their respect for these rules,[136] but to allow for their better adaptation to the different realities that they regulate, without the loss of their core protection.

*4.A.3. The* Sakhanh *case*

Perhaps the most relevant recent development on the debate on NSAG courts, the case against Omar Haisam Sakhanh in Sweden,[137] was the first in which a court of a NSAG was directly analysed for the means of assessing the possibility of exclusion of criminal responsibility for the carrying out of acts that would amount to war crimes.[138] The decision of the District court on the matter of the legal basis for such courts under IHL of NIACs, which was followed in its position by the Appeals and Supreme Court, was highly influenced by the written and oral statements provided by Mark Klamberg, who was called as a witness, but, as the academic himself perceived, performed a role more akin to an *amicus curiae*.[139]

The case in question concerns a Syrian citizen who joined in 2012 the Suleiman Company, a NSAG operating in the outskirts of Idlib, in northwest Syria. After raiding a Turkish military post in the region of Kafar Kila, at the Syrian border with Turkey, Syrian soldiers that took part in the fight were arrested, tried and executed, Sakhanh being one of the members of the Company who carried out the sentence. in 2013, Sakhanh sought refuge in Sweden, alleging to the Swedish Migration Agency that he has never taken part in the fighting in his home country, a claim that was disproven

[136] Marco Sassòli, 'Taking Armed Groups Seriously…' *supra* at 112, 20-26.
[137] The Sakhanh case was initially judged at the Stockholm District Court (*Prosecutor v. Omar Haisam Sakhanh*, Stockholms tingsrätt (Stockholm District Court), B 3787-16, 16 February 2017, it was then appealed to the Svea Appeals Court (*Prosecutor v. Omar Sakhanh Haisam Sakhanh*, Svea hovrätt (Svea Appeal Court), B 2259-17, 31 May 2017, and finally it reached the Swedish Supreme Court (*Prosecutor v. Omar Sakhanh Haisam Sakhanh*, Högsta domstolen (Supreme Court of Sweden), B 3157-17, 20 July 2017. For the English transcript of the relevant parts of the District Court judgement, see 'On the Establishment of Courts…', *supra* at 11.
[138] Mark Klamberg, 'The Legality of Rebel Courts…', *supra* at 49, 254.
[139] *ibid.*, 237, fn. 10.

after footage of his execution of the captured soldiers surfaced, leading to his arrest.[140]

In its sentence, the Stockholm District Court found that, in accordance with CA3, a captured fighter cannot be executed without a previous judgement pronounced by a 'regularly constituted court', affording all the judicial guarantees recognised as indispensable by civilised peoples. Though the expression 'regularly constituted court' may give the impression that only states are entitled to convene courts during a NIAC, particularly if taken into consideration the principle of legality, it was the view of the Court that, considering the Updated Commentary to the Geneva Conventions, the interpretation of what is 'regularly constituted' should be as broad as possible.[141] The decision took into account the argument that article 6(2) of APII had shifted the understanding on the legality of NSAG courts by replacing the requirement 'regularly constituted' for 'independence and impartiality', as well as rule 100 of the ICRC's Customary International Law Study. Considering the submission made by Klamberg, the court recognised the inherent contradiction in IHL, in which NSAGs possess the obligation to punish violations of this branch of international law, and at the same time, under a strict interpretation of 'regularly constituted court', are prevented from holding violators accountable.[142]

The District Court also subscribed to Klamberg's view that, in situations in which NSAGs had control of certain territory, they should be bound to maintain law and order, and be able to convene courts if these courts were composed by judges who held the position prior to the outbreak of the conflict (being, in this manner, originally

[140] 'On the Establishment of Courts…', *supra* at 11, 403-405.
[141] Mark Klamberg, 'The Legality of Rebel Courts…' *supra* at 49, 256.
[142] *ibid.*

appointed by the state for the function). Additionally, the adjudication should be based on the pre-existing state legislation, with NSAGs being discouraged to apply a more severe legal regime than the one imposed by the state before the start of the NIAC. According to Klamberg and the Court, this combination of requirements allows NSAGs to prosecute individuals in only two scenarios: in the enforcement of discipline among their own forces; and when having access to state judges – that have a presumption of being qualified for the role – and applying state law or a less severe legal regime.[143]

When analysing the judicial guarantees required for a fair trial, the Court found that, based on CA3 and customary international law, the following guarantees should apply to situations of prosecution in NIACs: 1) the presumption of innocence; 2) the right to a defence prior to, and during, trial; 3) the right of the accused not to be compelled to testify against himself or herself; 4) the right to be tried without undue delay; 5) the right to examine witnesses against the accused and to obtain the attendance and examination of witnesses on behalf of the accused; 6) the right to a public trial and to have the judgment pronounced publicly; 7) and the right to appeal. Comparing the named guarantees with those found in IHL of NIAC, it is clear that the Court's criteria are much more stringent than even Article 6(2) of APII, which, was created to develop and supplement the provisions in CA3. Even Klamberg notes that, in case customary international law proved a legal basis for prosecutions based on the judicial guarantees of independence and impartiality, the concept of these judicial guarantees was expanded beyond a reasonable interpretation.[144]

[143] *ibid.*, 256-257.
[144] *ibid*., 257-258.

Having decided on these requirements, the District Court assessed Sakhanh's case, finding that, once the Suleiman Company was not part of the Free Syrian Army, and that it did not have stable control over the territory and the population in Idlib, the claim that the death sentences, executed by Sakhanh, were not handed by a legitimate court under the requirements of IHL. Additionally, the Court found that the rebel tribunal failed to comply with the required judicial guarantees by applying a combination of Shari'a and Syrian law, applied by a mixed body of adjudicators, including judges who defected from the government and Imams.

Moreover, the judgements were plagued by a series of illegalities, including the fact that the punishment for fighting against the rebels was death, that the defendants were not allowed the right to legal counsel or to prepare their own defence, there was significant evidence that torture was used during interrogation, and in the case of the judgements involving Sakhanh, from the moment of capture to their execution, the Syrian soldiers were detained for merely 41 hours, which was considered insufficient for any legal proceeding to be held granting all the required fair trial guarantees.[145]

With these elements in hand, the Stockholm District Court found that Sakhanh had committed *'grave breaches of the Geneva Convention'* (which are only applicable to violations committed during IACs) by executing the captured soldiers. The court took account of the fact that Sakhanh had the understanding that the men were executed by merely being fighters, his opinion that they 'did not deserve' a legal defence, and that, in the footage that was published of the execution, the word 'revenge' was used, denoting the unfair character of the sentence.

[145] *ibid.*, 258-259.

After being convicted at the District Court, the defendant appealed to the Svea Court of Appeal, where he was again convicted, under the reasoning that Sakhanh was aware of the insufficient time that had passed between the soldiers' detention and execution, as well as due to his understanding that they were executed merely for being part of the state's armed forces. Despite attempting to appeal once again, the Swedish Supreme Court ruled that Sakhanh's case did not fulfil the exceptionality requirements to be granted leave to appeal.[146]

Despite being an unprecedented and bold decision from the Swedish justice system, demonstrating an awareness of the situation faced by many living under rebel rule, as well as the willingness to propel the debate on the growing role of NSAGs, the decision from District Court suffered from a few vital flaws that significantly prejudice its legal reasoning.

The key mistake committed by the Court was, when evaluating Klamberg's submission as a witness, to take what the author considered to be 'model situations' and used these ideal scenarios as an exhaustive list when defining the requirements for prosecutions by NSAGs.[147] This approach significantly undermines one of the most important elements to consider when discussing the application of international law to NSAGs: the incentive for compliance.

By determining, for example, that NSAGs would only be allowed to conduct trials if making use of state courts and judges, which were either left behind or that defected (even though, in this last instance, there could be considerable doubts whether the defecting judge would still be considered to be a state judge for the purposes of the establishment of NSAG courts), the decision imposes a severe limitation on the

[146] *ibid.*, 259-261.
[147] *ibid.*, 251-254, 257 fn. 106.

capacity of such groups to realistically comply with these requirements. By determining that rebels would only be able to try individuals in already existing state courts and by employing state judges, it is arguable that the District Court has set requirements for the establishment of courts by NSAGs. In practice, what was decided was the capacity of NSAGs to continue the operation of mechanisms already in place, set by their opponents. The requirement of state judges, even though reasonable (as if this would not provide for an impartial and independent procedure, at least it guarantees a capable adjudicator), are not justified or grounded in custom, case-law, or treaty (as under IHL or ICL there is no such requirement, while under IHRL, if adopting a conservative stance, these judgements would be objectively illegal).

A probably unimagined consequence of this was highlighted by Somer, which is the risk regime judges would be under if this requirement becomes an international standard. By claiming that NSAGs capacity to prosecute in a NIAC is dependent on the access of these groups to trained judges, the Stockholm District Court encouraged the targeting of these individuals by the state, either when they are expelled or voluntarily leave a state-controlled territory.[148] A complementary consideration could be made to Somer's argument. While on one hand, judges would be under the risk of attacks by the state, on the other they could become a target of kidnappings in state-controlled territory, or even be submitted to various levels of coercion to work on these 'state created, NSAG controlled' courts. As yet an additional consequence, these individuals, by taking part in NSAG courts – via kidnapping or coercion – could be considered, under a more liberal view, to be

[148] Jonathan Somer, 'Opening the Floodgates, Controlling the Flow: Swedish Court Rules on the Legal Capacity of Armed Groups to Establish Courts' (10 March 2017) *EJIL Talk!*.

performing a continuous function in a NSAG, and effectively losing their civilian protection, as it could be argued that judges convicting members of the armed forces do fulfil the requirement thresholds of harm, direct causation, and belligerent nexus to be considered participants in the conflict.[149]

Finally, as a consequence of this severe limitation on the capacity to set up courts, or as pointed above, the limitation to merely continuing the administration of already existing state courts, NSAGs are prevented from putting under trial individuals – members of the armed forces or other NSAGs in general – accused of committing war crimes or general violations of IHL. Aside from the concerns in relation to compliance, the lack of legitimacy to prosecute violations of IHL and war crimes creates a disparity within NSAGs, as these organisations are allowed to prosecute their own members while being prohibited to prosecute captured fighters, effectively providing less protection to their own members. It could also be argued that this prohibition runs counter to the idea of preventing international crimes, as it is highly unlikely that these groups would be willing to hand over international criminals to the state they are fighting against, being also unlikely the agreement between these groups and third states for reasons of transfer and prosecution.

Instead of allowing NSAGs to set up their own courts, by adopting a gradated approach to the legal basis requirements or by abandoning the idea of a 'regularly constituted court' in favour of a court guaranteeing independence and impartiality, as suggested by a significant part of the scholarship, the Swedish District Court chose to prohibit the creation of courts by these organisations under all but one situation,

[149] For a better explanation on direct participation in hostilities, particularly in the modality of general war effort, see Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (International Committee of the Red Cross 2009), 46-59.

rending them in practice incapable of carrying out a crucial function in war-fighting, and ironically, incentivising summary executions, in a similar, yet less elaborate manner, than the one they condemned in the Sakhanh case.

*4.A.4. Courts* ratione personae

A final position in relation to insurgent courts rejects the flexibilization of the legal basis requirements for the establishment of rebel tribunals, fearing the creation of a dangerous slippery slope. Instead, proponents of this theory submit that, in order to preserve the principle of equality of belligerents while preventing the lowering of judicial guarantees' standards, the 'regularly constituted' expression requirement should be interpreted differently depending on the person to be prosecuted.[150] In this sense, when a court, either belonging to a NSAG or the state, prosecutes a member of the opposition force, a strict interpretation of 'regularly constituted' should be adopted. On the other hand, when prosecuting a member of its own forces, state and rebels alike would be allowed to approach the legal basis in a loose fashion.[151] Consequently, when attempting to prosecute a member of the armed forces or of a rival NSAG, a NSAG would only be allowed to do so under the strict meaning of a 'regularly constituted court', *i.e.* a court established by state law and customarily used by the state, in accordance to the US Supreme Court decision in *Hamdan v. Rumsfeld*.[152] This proposition would open the possibility for two possible policy approaches states could adopt in the recognition of armed group courts, a most constrained solution, or a broader one.[153]

[150] Parth S. Gejji, 'Can Insurgent Courts…' *supra* at 9, 1542-1543.
[151] *ibid.*
[152] United States Supreme Court, *Hamdan v. Rumsfeld*, *supra* at 8. See, particularly Justice Steven's majority opinion at 566-635.
[153] Parth S. Gejji, 'Can Insurgent Courts…' *supra* at 9., 1549-1554.

Regardless of the policy approach, the classification of judgments, according to this theory, should be divided under the previously explained *ratione personae* criteria, covering three different types of person: members of the own armed group, members of the armed forces, and civilians. Additionally, a *ratione materiae* criteria, would divide prosecution in four categories: for mere participation in hostilities, for the commission of war crimes or violations of IHL, for the prosecution of the NSAGs' penal code covering crimes not related to the armed conflict, as well as situations involving civil disputes.[154] Taking into consideration the already identified rule regarding the interpretation of the legal basis, instead of three groups, armed groups would only be able to potentially prosecute two groups of people, themselves and the civilian population. In addition to that, it is recognised that both CA3(1)(d) and article 6(2) of APII are silent in relation to the creation of courts for the adjudication of civil disputes, the legal basis for such conducts, being relegated to national law.[155]

After laying down the framework of prosecutions available to NSAGs, two policy options are presented, the first would be to adopt a constrained solution, while the second would be to allow prosecutions under a broader approach. Under the constrained solution, the armed group would be allowed to prosecute their own members for the commission of war crimes and violations of IHL, as well as for the commission of common crimes, unrelated to the conflict. In addition to that, the group would have the legitimacy to address civil disputes involving their own members. An exception should be considered, though. While competent to prosecute their own members, NSAGs would not be able to try their own members who were merely participating in hostilities against their own group. This, according

[154] *ibid.*, 1549-1550, 1552-1553.
[155] *ibid.*, 1550.

to those that defend this approach, should not be allowed due to the fact that the only plausible scenario in which such acts could occur would be in a situation in which this fighter joins the side of the state, to act against their original group. In this scenario, it would be unfair to provide greater protection for the armed forces even though both rebel and soldiers are committing the same actions. In addition to this prohibition, when applying the constrained approach, NSAGs would not be able to prosecute civilians or be involved in civil disputes involving civilians, due to concerns that these courts would abuse and mete out unfair punishments.[156]

Finally, in the second policy approach, the broader approach, NSAGs would still not be able to prosecute members of the state's armed forces, to avoid equating their courts with state ones. On the other hand, this policy approach would allow NSAGs to prosecute their own members for crimes against humanity and violations of IHL, and for mere participation in hostilities against the group, as well as to adjudicate civil disputes involving their members. In relation to the civilian population, an armed group would be able to conduct prosecutions using the same grounds that are used to prosecute members of the group, including in cases of civil disputes.[157]

Despite presenting these two solutions, Geiji recognises the problems in adopting either of them. In relation to the constrained solution, the author anticipates a problem with compliance, as this approach would be mostly unfavourable for NSAGs, and as such it is it unlikely it would be seen as an unbiased solution. On the other hand, regarding the broader approach, the scholar acknowledges the uncertainty civilians would be subjected to, by allowing free reign to NSAGs, as well as the possible exploitation of the civil dispute mechanism. The concerns regarding

[156] Parth S. Gejji, 'Can Insurgent Courts…' *supra* at 9, 1550-1551.
[157] *ibid.*, 1552-1553.

insecurity are extended to members of the armed group tried for the commission of acts against the group.[158]

Despite recognising the inherent problems in his proposition, Geiji fails to see the most important flaw in his theory's logic, which is the blatant violation of the prohibition of adverse distinction. This principle is a foundational stone of IHL, not only being explicitly presented in CA3, when it determines that

> *'Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.* (…)*'*[159]

And reaffirmed in article 4(1) of APII, when it determines that *'All persons who do not take a direct part or who have ceased to take part in hostilities* (…) *shall in all circumstances be treated humanely, without any adverse distinction'*,[160] as well as being considered customary IHL, as demonstrated in the ICRC Customary Study. In accordance to the Study, the prohibition on adverse distinction is applicable in almost all instances, the only exception being in relation to priority in treatment for those in the most urgent need of care.[161]

Not only that, but, the principle of non-discrimination, included in all the main IHRL treaties,[162] and the close equivalent of the prohibition of adverse distinction, is

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[158] *ibid.*, 1552, 1554.
[159] Common Article 3(1).
[160] Article 4(1), Additional Protocol II.
[161] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules* (Cambridge University Press 2009), 308-309.
[162] For instance, see article 2(1) of ICCPR; articles 2(2) and 3 of the International Covenant on Economic, Social and Cultural Rights. 16 December 1966; article 14, European Convention on Human Rights (ECHR). 4 November 1950; article 1(1) of the American Convention on Human Rights (ACHR). 22 November 1969; Article 2 of the African Charter on Human and Peoples' Rights (ACHPR). 27 June 1981; article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination. 21 December 1965; article 2 of the Convention on the Elimination of All Forms

applicable to situations of NIAC. Despite not being explicitly considered a non-derogable right, the principle of non-discrimination found in ICCPR possesses some aspects that cannot be derogated under any circumstance,[163] as these derogations are conditioned to the *'strictly required by the exigencies of the situation'.*[164] Considering that, in the few instances in which NSAGs are subjected to IHRL obligations these entities cannot derogate from them, it is to be understood that no type of discrimination is permitted under IHRL.

In this sense, not only such a distinction *ratione personae* is illegal, but it would probably prevent armed groups from complying, as it would be excessively disadvantageous, in its constrained or broad version. Furthermore, it is important to stress that, unless acting *qua*-state in a given territory, NSAGs do not possess the legitimacy to adjudicate civil disputes, as IHL applicable to such entities contemplates only criminal and disciplinary prosecutions; the possibility of judging civil cases being based on the applicability of IHRL and consequently following much stricter procedures.

A final aspect that should be taken into consideration in relation this proposed approach, is that, as explained by its author, by default, prosecutions by NSAGs should not be allowed except for their own members, any additional concessions being a matter of policy. As such, any position taken by the state in question would be discretionary, forcing NSAGs into a degree of legal uncertainty which does not help in promoting compliance.

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of Discrimination Against Women. 18 December 1979; as well as article 2(1), Convention on the Rights of the Child. 2 September 1990.

[163] Human Rights Committee, *General Comment No. 29: Article 4: Derogations during a State of Emergency*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, par. 8.

[164] Article 4(1), ICCPR.

## 5. An Alternative solution

Despite the solid arguments presented by the scholarship, the problem of the legal basis for prosecutions by NSAGs in CA3 and APII remains. As it was demonstrated above, there are some evident flaws that compromise either the operationalisation of the norms or jeopardise the incentives to compliance by NSAGs. Building up on all these approaches, I submit an alternative solution that provides a more nuanced approach to the great disparity between NSAGs, while avoiding pushing the norms beyond their breaking point.

The proposed alternative approach is based on two pillars: a) the theory of the sliding-scale of obligations, as proposed by Marco Sassòli;[165] and b) the concept of exclusive territorial control.[166] While considering that the obligations contained in IHL norms should be respected, the adaptation of such norms to the particular reality of a NSAG – an analysis that should be made in a case-by-case basis – should take into consideration this group's capacity to comply with the core obligation of such norm. At the same time, it is important to recognise that, with an increasing level of territorial control, there is a concurrent increase in the capacity to comply with these norms as they are intended to be applied to states, as the armed group itself would become increasingly state-like as it displaces state authority and establishes itself as the *de facto* authority in the controlled territory. In this sense, this theory would operate in two axes, the first being capacity, while the second being the scope of obligations.

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[165] Marco Sassòli, 'Introducing a sliding-scale of obligations to address fundamental inequality between armed groups and the state?' (2011) 93(882) *International Review of the Red Cross*.

[166] See, for instance, Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55(2) *International and Comparative Law Quarterly*, 152; Daragh Murray, *Human Rights Obligations…supra* at 60, 121; and Liesbeth Zegveld, *Accountability of Armed Opposition… supra* at 5, 15.

Initially it is important to recognise that, despite the movement towards focussing on APII requirements for the establishment of courts in a NIAC, *i.e.* independence and impartiality, it should be reiterated that the requirement contained in CA3, a regularly constituted court, is still applicable, as APII was devised to develop and supplement the provisions contained in CA3,[167] not to restrict and replace them. With this in mind, if analysing the relationship between capacity and territorial control, this apparent inconsistency is resolved, as, while NSAGs operating in the lower threshold of a NIAC do not, as a rule, possess stable territorial control (and consequently, do not possess sufficient capacity to perform state-like functions), their counterparts operating at the higher end of the NIAC threshold, do exercise considerable territorial control, to the point of acquiring – or being on the verge of acquiring – a form of limited international personality.

This idea is further reinforced if considering that, during the Diplomatic Conference of 1974-1977, there was a generalised fear of lowering the standards for prosecution among the states' delegations. The situation eventually led to ICRC delegate, when proposing the wording for article 6, which replaced the criterion of a 'regularly constituted court' by the criteria of independence and impartiality, to declare that

> *'Both articles* [draft articles 9 on the 'Principles of Penal Law' and 10 on 'Penal Prosecutions', which eventually became article 6] *should be considered in the light of article 1, already approved by the Committee and more particularly of the last sentence of paragraph 1 thereof, which stated that dissident armed forces might "exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the present Protocol" (CDDH/I/274). It was therefore no longer hypothetical to admit that the insurgent forces would be in a position to apply articles 9 and 10 if they intended to try those who were in their power. The insurgent party could for that purpose make use of the courts existing within the part of the territory under*

[167] As *per* article 1(1), Additional Protocol II.

> *its control which could set in motion or set up people's courts. The insurgent party must then conform to articles 7 and 10 at least in the administration of justice for every human being had the right, whatever the circumstances, to be tried under acceptable and decent conditions'*[168]

As can be seen, the approval of the new criteria adopted in APII was conditional to the requirement that the NSAGs involved in the conflict *'exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'*.[169] In this sense, the trade-off of allowing for a laxer legal basis requirement would be an enhanced organisational capacity.

With this differentiation between legal bases rooted in the territorial control criterion, three different scenarios for prosecution can be identified, which will be explored separately below. The first one, includes NSAGs fighting a lower threshold NIAC while not possessing international legal personality. The second relates to NSAGs fighting a higher threshold NIAC while not been vested with international legal personality. The final scenario would be of NSAGs bestowed with international legal personality, fighting either a high or low threshold NIAC.

It is important to highlight that, while it would be highly unlikely that a group without the appropriate level of organisation and capacity would be able to achieve such territorial control as to possess limited international personality, this scenario is not impossible. Taking into consideration that, as seen in Chapter 1, section 1., the classification of NIACs comprises the analysis of not only organisation, but also intensity, it is possible to have a highly organised NSAG, controlling exclusively a large expanse of territory, engaging in a low intensity conflict. Alternatively, it is

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[168] Federal Political Department of Switzerland, *Official Records of the Diplomatic Conference…Volume VIII supra* at 40, 347, par. 24.
[169] Article 1(1), Additional Protocol II.

possible that a group, once highly organised to the point of developing a limited legal personality, loses its capacity while retaining its exclusive territorial control.

### *5.A. Lower threshold conflicts*

In a lower threshold NIAC, the armed group(s) involved are subjected exclusively to the norms contained in CA3. These are the groups originally described by James Bond, from guerrillas without territorial control, relying on hit-and-run tactics, to unorganised groups with precarious or fluid territorial control and chronic lack of resources.[170] In this scenario, prosecutions carried out by these groups would possess a strong presumption of illegality and partiality, unless carried out in accordance with the applicable domestic law. This is the understanding of the ICRC in its Customary Study, which considers a court to be regularly constituted if *'*(…) *it has been established and organised in accordance with the laws and procedures already in force in a country'.*[171] This can be taken to comprise criminal provisions, the laws for the establishment courts, the laws of procedure in operation in these courts, as well as disciplinary provisions of the armed forces.

These national laws can be roughly divided between constitutional norms relating to the separation of powers, establishing the judicial system of a given state;[172] legislation relating to the typification of not only common crimes, but also international crimes such as violation of IHL and war crimes;[173] and the applicable

[170] James Bond, 'Application of the Law…', *supra* at 17.
[171] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian… Volume I: Rules supra* at 161, 355.
[172] Among the many constitutional documents containing such text, see for instance, see articles 92-126, Constituição da República Federativa do Brasil; articles 92-104, Grundgesetzt für die Bundesrepublik Deutschland; articles 228-257, Constitución Política de Colombia; articles 188-191c, Constitution Fédérale de la Confédération Suisse du 18 avril 1999.
[173] Among the many infra-constitutional documents containing such text See, Brazil: Decreto-lei nº 2.848 de 7 de dezembro de 1940 (Brazilian Criminal Code), Decreto nº 4.338 de 25 setembro de 2002 (Internalisation of the Rome Statute into the Brazilian legal order); Germany: Strafgesetzbuch (German Criminal Code), Völkerstrafgesetzbuch (Germany Code of Crimes Against International

criminal procedural law, regulating procedure, but also other elements, such as guarantees of impartiality, due process etc.[174]

The constitutional norms establish elements such as judges' and prosecutors' appointments, the regulation of the legal profession, the guarantees and prerogatives of these individuals, courts' jurisdiction *ratione materiae, ratione personae* and *ratione loci*, among others. While these elements play an important role in the establishment of courts, due to the intrinsic link between a constitutional order and a government, conforming with these norms is impossible to any NSAGs short of possessing international legal personality, and being able to establish its own constitutional order.

By way of example, Mexico's Zapatista Army of National Liberation (EZLN in Spanish), as of 2018, controlled 38 of the 111 municipalities of the state of Chiapas, totaling 148,000 hectares of exclusively controlled territory,[175] and ruling over an estimated 360,000 people.[176] According to EZLN, these municipalities are administrated autonomously, with the group's oversight. Despite these impressive numbers and their relative organization, the conflict between ELZN and Mexico is not considered to be a NIAC.[177] In the event this group decided to institute a judicial

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Law); Colombia: Ley 599 de 2000 (Colombian Criminal Code), Ley 742 de 2002 (Internalisation of the Rome Statute into the Colombian legal order); Switzerland: Code Pénal Suisse (Swiss Criminal Code).

[174] Among the many infra-constitutional documents containing such text, see Brazil: Decreto-lei nº 3.689 de 3 de outubro de 1941 (Brazilian Code of Criminal Procedure); Germany: Strafprozeßordnung (German Code of Criminal Procedure); Colombia: Ley 906 de 2004 (Colombian Code of Criminal Procedure); Switzerland: Code de procédure pénale Suisse (Swiss Code of Criminal Procedure).

[175] María Inclán, *'The Zapatista Movement and Mexico's Democratic Transition: Mobilization, Success & survival'* (Oxford University Press, 2018), pp. 7-10, 16-18.

[176] N./d, 'Autoridades electorales validan el 94% de las firmas de Marichuy, pero se queda corta: le faltaron 600 mil' (*Sin Embargo*, 17 March 2018) < https://www.sinembargo.mx/17-03-2018/3398402> accessed 13 February 2018.

[177] This was true in 2018 and it remains so as of 2023. See, Anyssa Bellal, *'The War Report: Armed Conflicts in 2018'*, (Geneva Academy of International Humanitarian and Human Rights Law 2019);

system, independent from Mexico's, in order to tackle criminality more efficiently in the area, they would have to abide by Mexican law. Among the many Constitutional provisions necessary to create a parallel Judicial System, this institution should be a part of a bigger structure, since *'The power of the states will be divided, in it's exercise, between the Executive, Legislative and Judicial* [powers] […]*.'*[178]It seems clear that such constitutional requirement, among many others, are far beyond the reach of the group.

The other type of law of particular importance to this context, a criminal legislation typifying the relevant illegal acts – which might exist outside the codified format of traditional codes – defines the conducts that are liable to criminal persecution. These violations may include common crimes, such as theft, homicide, and rape, but also comprise international crimes, such as war crimes, crimes against humanity, or violations of IHL. Differently from constitutional norms, these norms should pose no problem to NSAGs, as it requires only an appropriate interpretation and application, taking into consideration the existing limitations, *i.e.* that these crimes have a nexus with the NIAC.

For instance, in a hypothetical situation in which a Brazilian NSAG has captured a member of the Brazilian armed forces, who stands accused of having systematically executed unarmed civilians for allegedly collaborating with the NSAG. Regardless of its organizational or territorial characteristics, the mere capacity to interpret the legislation in force would be sufficient in order to comply with the criminal typification

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and Geneva Academy, *'RULAC: Rule of War in Armed Conflicts'* <https://www.rulac.org/browse/conflicts> accessed 13 February 2023.

[178] Constitución Política de los Estados Unidos Mexicanos, enacted in 1917, last updated in 2022: '*Artículo 116. El poder público de los estados se dividirá, para su ejercicio, en Ejecutivo, Legislativo y Judicial, y no podrán reunirse dos o más de estos poderes en una sola persona o corporación, ni depositarse el legislativo en un solo individuo'* (author's translation).

requirement. In this case, article 8(2)(a) of Decreto No. 4388/2002 that promulgates the Rome Statute.[179]

At this point it is important to highlight that, despite ideally seeking to establish equality between state and NSAGs, by relegating the legal basis for prosecution to domestic law, IHL allowed for some significant differences in the application of the provisions relating to prosecution between government and rebels. One of these differences befalls the capacity to prosecute enemies for mere participation in hostilities. Although committing any act of hostility against a public agent is invariably a violation of a state's criminal code, the same cannot be said in relation to members of NSAGs, unless when this is done in very specific situations, such as when the individual is rendered *hors de combat*.

An additional argument has been raised in relation to the perceived lack of impartiality of trials of members of the armed forces by mere participating in hostilities.[180] The argument, although possessing some merit, ignores that partiality (or the lack of it) should not be assumed but assessed in each particular case. As such, in a hypothetical scenario in which an attack on NSAGs could be construed as a crime under domestic law, the violation of IHL on the part of such group prosecuting members of the armed forces for mere participation in hostilities is not the consequence of the person being prosecuted, but of the eventual lack of impartiality of the court, an argument that not only must to be proven in a case-by-

[179] Decreto nº 4.338, *supra* at 173.
[180] Mark Klamberg, 'The Legality of Rebel Courts…' *supra* at 49, 257.

case basis instead of being assumed, but that it can also be made in relation to state prosecutions of members of NSAGs. [181]

Finally, the last category of laws that are applicable to this context are procedural criminal laws. These norms regulate certain jurisdictional aspects of penal prosecutions that might require considerable effort and resources from the NSAG, or even be impossible to be complied with. Nevertheless, most norms contained of procedural character are concerned with the creation and regulation of judicial guarantees, such as discovery, the regulation of court procedures, the guarantee of access to information that might benefit the defendant. Additionally, criminal procedural provisions also establish rules to ensure judicial independence and impartiality, which are often treated as judicial guarantees, justifying the confusion in the classification of these elements between legal basis and judicial guarantees.[182]

Considering these three different forms of law addressing 'regularly constituted' courts, a gradated approach should be adopted in relation to the obligations contained in such norms. To defend otherwise, in the sense that there should be no adaptation of these norms to the context of NSAGs, is to accept that international law has created equal obligations to both states and NSAGs but does not provide an equal outlet for these obligations to be fulfilled, in contradiction to Common Article

[181] This interpretation is supported under IHL, ICL, and IHRL. See, for instance, Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights – Cases, Materials, and Commentary* (3rd ed Oxford University Press 2013) 458, [14.67] pars. 9.6-9.7; Kai Ambos, *'Treatise on International Criminal Law - Volume II: The Crimes and Sentencing'* (Oxford University Press 2014) p. 183; and International Committee of Red Cross, *'Customary International Humanitarian Law Database – Rule 100. Fair Trial Guarantees,* <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule100> accessed 13 February 2023; See also, René Provost, *Rebel Courts: the administration… supra* at 1, 432.

[182] As can be seen in International Criminal Court, *Elements of Crimes, supra* at 59, 34.

1.[183] Needless to say, this would go against the principle of good faith, in accordance to articles 26 and 31(1) of the Vienna Convention on the Law of Treaties.[184]

Considering that in a lower threshold NIAC in which NSAGs are not vested with limited international legal personality, the majority – if not the totality – of these groups severely lack resources, personnel, as well as stable control of territory, the extent to which the obligations contained in this proposed framework can be complied with are limited. As explained above, without possessing international legal personality, such entities cannot objectively comply with constitutional norms establishing, for example, the division and hierarchy of the Judiciary, as these rules are created with a government in mind, and any attempts at creating a new constitutional order would be invalid and ineffective, as these groups are subjected to their parent state's legislation via domestic prescriptive jurisdiction. The same is not true in relation to states' criminal and criminal procedural norms. Upholding a criminal code, when adjudicating an armed conflict-related violation, simply requires an adequate interpretation of the law. Compliance with procedural rules in criminal trials, though, requires the application of a sliding-scale of obligations, while attempting to preserve the core obligations of the norms and simultaneously rendering the provisions feasible for most NSAGs.

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[183] *'Article 1. — The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.'*

[184] *'Article 26*
"Pacta sunt servanda"
*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*
*(…)*
*Article 31*
*General rule of interpretation*
*1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'* Vienna Convention on the Law of Treaties, Done at Vienna on 23 May 1969. Entered into force on 27 January 1980.

With this in mind, having the possibility of, and at times the obligation to, establish 'regularly constituted courts,' while not being able to achieve the constitutional standards set for states, poses an insoluble problem for NSAGs trying to comply with their obligations, as well as a risk for those accused of crimes and in the hands of these groups. Therefore, in order to provide a viable solution, these NSAGs would still need to comply with judicial guarantees that should be afforded during a fair trial, while at the same time adapting these requirements, in a way that is compliance is achievable in certain less-than-ideal situations. Very importantly, this proposed adaptation should only be implemented up to the point where the core obligations of said norms are not violated.

*5.A.1. Independence and impartiality*

A discussion regarding judicial guarantees in NSAG courts will be undertaken in greater detail in Chapter 6, nevertheless, there some of these judicial guarantees are intertwined with the concept of an independent and impartial court, which is a concept common in IHL, ICL, and IHRL.[185] This apparent overlap stems from the subtle difference between the capacity of the judging authority, and the substantive requirements of a court, in order to guarantee a fair trial.[186] For the purpose of the current chapter, the notion of independence and impartially will be analysed on the latter sense.

Considering that these two elements are shared between IHL, ICL, and IHRL,[187] it would be consistent with the idea behind this intersection to explore these standards

[185] See for instance, Kai Ambos, *'Treatise on International Criminal Law - Volume II…'*, supra at 183, pp.182-183.
[186] Manfred Nowak, *U.N. Covenant on Civil… supra* at 92*,* 314; and Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims… supra* at 89, 745-748.
[187] United Nations Human Rights Committee, *General Comment No. 31 (Article 2) on the Nature of the General Legal Obligations imposed on State Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, par. 11.

under a IHRL scope as a starting point. In General Comment 32 (GC32), on the right of equality before courts and tribunals and to a fair trial, the UN has clarified these concepts in great detail.[188] When addressing the requirement of independence, GC32 explains that it refers to

> '[…] *the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.'*[189]

As can be verified from the extract, independence can be roughly divided between guarantees aiming to protect the adjudication of any undue influence from external actors, and the independence of the court, by the preservation of the tripartition of powers. While the first part of the concept addresses the judging authority, the latter addresses the substantive requirements of independence of the court. This idea is reinforced in other authoritative instruments such as the UN Basic Principles on the Independence of the Judiciary.[190]

Applying the idea of independence to a NSAG court would then mean that, to carry out fair judgements, this tribunal should be independent from other branches of the organisation, be it its armed wing or central committee. That would preserve the adjudicator from being ordered to adopt a specific position, or even to go against their hierarchical superior. This undue influence can be verified, for instance, in the *Bemba Gombo* case, when the ICC found that seven soldiers court martialled by the

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[188] United Nations Human Rights Committee, *General Comment No. 32 (Article 14) on the Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32, 23 August 2007.
[189] *ibid.*, par. 19.
[190] United Nations, *'Basic Principles on the Independence of the Judiciary'*, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Independence of the Judiciary 4 and 6.

*Mouvement de libération du Congo* (MLC) on the charges of pillage, and found guilty, were not appropriately judged. Not only was Mr Bemba heavily involved in the trial, as he had appointed both the presiding judge and the prosecutor, and would receive daily updates of the deliberations, but it was also established that the judges were merely executing Mr Bemba's orders.[191] Due to situations such as this, the relatively high threshold is entirely justified, and it would prevent NSAGs with lower levels of organisation to set up their own courts, as it is unlikely they would be able to clearly differentiate its judicial branch from their armed wings or other administrative structures.

A possible alternative would be to refer the accused to institutions that are not directly related to the organisation. For instance, after taking control of the Gaza Strip, Hamas replaced the existing judicial to a system of customary law (*urf*) which called for extended families or clan elders (*hamail*) to take over the administration of justice. This arrangement was, at least in theory, capable of countering the influence of the armed group, as these *hamail* would traditionally be the only ones with the mandate to exercise authority over the population.[192] Of course, the reliance on these alternatives do not preclude the use of already established state tribunals as well as former state judges and legal professionals when state authority has been displaced, be it completely or even partially, and a proper separation between institutions can be carried out.[193]

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[191] *The Prosecutor v. Jean-Pierre Bemba Gombo* (21 March 2016) *Judgment pursuant to Article 74 of the Statute* (Trial Chamber III), ICC-01/05-01/08, §§597-600. For a broader explanation of the context of the *Bemba Gombo* case and the possible reasons for the lack of partiality in the court martial procedures, see Martha M. Bradley, '"All Necessary and Reasonable Measures" – The *Bemba* Case and the Threshold for Command Responsibility' (2020) 20 *International Criminal Law Review*.
[192] Björn Brenner, *Gaza under Hamas… supra* at 1, 127-130.
[193] As proposed by Mark Klamberg, 'The Legality of Rebel Courts…' *supra* at 49; and René Provost, *Rebel Courts: the administration… supra* at 1, 186-187.

An exception to this rule would be military trials bearing a causality nexus to the armed conflict. As pointed out by Provost, while a few countries employ civilian judges in military courts, or members of the armed forces being afforded the same protections granted to civilians, *i.e.* not being bound by military hierarchy, or being obliged to follow superior orders, most countries make use of military courts subjected to the armed forces hierarchy and regulations.[194] Although the requirement that military courts should be autonomous from the armed forces is not an issue in when it comes to IACs,[195] there is no mention in relation to NIACs. On the other hand, IHRL is vocal about the failures of military courts in terms of independence. The Inter-American Court of Human Rights has established consistently that military courts violate the requirement of independence, and in relation to the judgement of civilians in military courts, the Court considers these situations blatant cases of violation of fair trial.[196] The same can be said in relation to other regional systems.[197] While a degree of discretion should be afforded to NSAGs when making use of military courts, as long as they comply with the independence

[194] René Provost, *Rebel Courts: the administration… ibid.*, 209.
[195] As can be seen in article 84 of the Third Geneva Convention relative to the Treatment of Prisoners of War of 1949; article 66 of the Fourth Geneva Convention on relative to the Protection of Civilian Persons in Time of War of 1949; as well as article 75(4) of the Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977.
[196] There are many judgements in this sense, but see, for instance the landmark case of Castillo Petruzzi y otros vs. Perú (1999). More recent cases include Casierra Quiñones y otros vs. Ecuador (2022); Cortez Espinoza vs. Ecuador (2022); Alvarado Espinoza vs. México (2018); Herzog e outros vs. Brasil (2018).
[197] See for example, the jurisprudence of the European Court of Human Rights, *Case of Incal v Turkey* (1998), 41/199/825/1031; *Case of Gerger v. Turkey (no. 2)* (2004), 42436/98; as well as *Case of Karataş v. Turkey* (1999), 23168/94. For jurisprudence of the African Commission on Human and People's Rights, see *Constitutional Rights Project (in Respect of Wahab Akamu, G. Adega and others) v. Nigeria* (1995), 60/91; *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v. Cameroon* (1997), 39/90; and *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistant Project v Nigeria* (1998), 218/98.

criteria, the Latin American experience serves as a good lesson on the results of judging civilians in military courts.[198]

Regarding the requirement of impartiality, it should be easier to be addressed by NSAGs. Under IHL, although CA3 does not address the issue, it is mentioned by article 6(2) of APII, which, considering the Protocol's complementary character, should also be applied to CA3. In relation to IHRL, this is an established concept, better described in General Comment 32, which determines that impartiality can be divided into subjective and objective impartiality. While, on one hand, the courts should not be influenced by factors such as personal bias or prejudice or allow adjudicators to act in an improper manner in benefit of one of the parties (subjective impartiality), they should also be perceived as an impartial body by the public. [199]

Having NSAGs applying state legislation to their own prosecutions could be challenging but it does not amount to any unsurmountable obstacle. Contrary to criticism raised by Heffes, which contests that approaching the domestic legal basis for prosecution from a state-centric perspective would completely prevent prosecutions in NIACs involving only NSAGs,[200] during any NIAC, regardless of the parties involved in it, the legal basis for prosecutions would be the domestic law of said country. In Heffes' proposed problem-scenario, both armed NSAGs would be bound by their parent state domestic legislation, due to the applicability of the principle of domestic prescriptive jurisdiction.

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[198] For more on military courts in regional systems, see Juan Carlos Gutiérrez and Silvano Cantú, 'The restriction of military jurisdiction in international human rights protection systems' (2010) 7(13) *Sur – International Journal of Human Rights*.
[199] United Nations Human Rights Committee, *General Comment No. 32 (Article 14)*…, *supra* at 188, par. 21.
[200] Ezequiel Heffes, 'Generating Respect for International…' *supra* at 101, 190-191.

The same can be said in relation to the additional question posed by the author. In case of a transnational, or multiple NIACs fought by the same NSAGs (scenarios appropriately name by Heffes as 'complex'),[201] the principle of domestic prescriptive jurisdiction would also be applied without any problems. In this sense, the early stages of the conflict between Israel and Hezbollah in 2006 would be regulated – on the armed groups' side – by Lebanese domestic law,[202] while conflicts taking place in Palestine should be subjected to Israeli domestic law. Similarly, during the NIACs fought between Islamic State, and Syria and Iraq, the same NSAG should be under different domestic regulations, depending on the place in which the prosecutions are taking place.

*5.A.2. Sliding scale approach to domestic legal basis*

As explained above, while the CA3(1)(d), requires a 'regularly constituted courts' to pass judgement in NIACs, the strict adoption of this requirement would render the norm inapplicable. For this reason, in order to comply with this norm, a gradual approach should be considered. The idea of the application of an adapted version of the relevant domestic law finds support, even if indirect, in the majority decision presented by Justice Stevens in Hamdan v. Rumsfeld,

> *'*(…) *While Common Article 3 does not define its "regularly constituted court" phrase, other sources define the words to mean an "ordinary military cour[t]" that is "established and organized in accordance with the laws and procedures already in force in a country." The regular military courts in our system are the courts-martial established by congressional statute. At a minimum, a military commission can be "regularly constituted" only if some*

[201] *ibid.*, 191; and *'Detention by Non-State Armed Groups under International Law'* (Cambridge University Press 2022), 114-115.

[202] On account of being considered a non-international armed conflict. On the later stages of the conflict, it could be argued that the situation had evolved to an international armed conflict. See Iain Scobbie, 'Lebanon' *in* Elizabeth Wilmshurst, *International Law and the Classification of Conflicts* (Oxford University Press 2012), 387.

> *practical need explains deviations from court-martial practice. No such need has been demonstrated here.'*[203]

The position adopted by the Justice is important in the recognition of this sliding-scale approach to the domestic legal basis, as it demonstrates at the same time that the authorisation for prosecutions resides in domestic law, and that this authorisation can be relaxed to some degree. Despite discussing the legality of a military court created by the United States' government, the conclusion can be applied equally to NSAGs, as the interpretation of a legal norm should not change *ratione personae*.

According to this analysis, the notion of 'regularly constituted' can only be changed if there is a *'practical need'* justifying this adaptation. As the inherent impossibility to comply with some norms in their entireness (such as the constitutional norms regulating the establishment of courts), or partially (the requirement that judges be independent by establishing a legal career with tenure in office, for instance) would lead to the meaninglessness of CA3(1)(d). The consequences of this could be extremely grave for individuals *hors de combat* and civilians in general, so it is submitted that there is a pressing practical need for this adaptation. Such situation is markedly different from the situation on *Hamdan v. Rumsfeld*, when this need was not recognised since the United States' government possesses the capacity to establish a regularly constituted court within the literal meaning of the norm. Clearly, this is not an option in the case of NSAGs, unless these entities are recognised as persons under international law.

### *5.B. Higher threshold conflicts*

While APII was designed to develop and supplement CA3, it is important to remember that said Protocol is explicit in declaring that it does so without modifying

[203] United States Supreme Court, *Hamdan v. Rumsfeld*, *supra* at 8, 632-633.

its existing conditions of application.[204] Following this logic, there is no other possible conclusion other than that article 6 of APII, instead of replacing the requirements contained in CA3(1)(d), clarifies that in NIACs, courts should offer essential guarantees of independence and impartiality, while being regularly constituted, *i.e.* being established in accordance to the laws of the state in which the conflict is taking place.

Aside from providing clarity regarding the concept of a regularly constituted court and specifying the applicable judicial guarantees that should be respected by said court, by the very nature of APII, article 6 provides stricter standards for the operation of such courts. The Protocol not only requires a higher level of organisation, but also territorial control, which would encompass groups performing state-like functions and, at times, invested of a limited form of international personality. These requirements can be seen as a stringent interpretation of the domestic laws applicable, while still considering those that cannot be complied with in absolute, both in relation to the legal basis for their creation and the judicial guarantees to be afforded by them.

An appropriate example would be a hypothetical situation in which a NSAG, having access to trained judges, and using the legal system already established by its parent state, much like Syria's Firqat Suleiman El-Muqatila in the Sakhanh case, is judging an alleged war criminal. In this scenario, having trained judges would allow for an appropriate typification of the conduct and interpretation of the law. In the case there are no lawyers or prosecutors available, using former court clerks or other individuals with legal knowledge, or in the absence of these, reputable individuals not

[204] Article 1, Additional Protocol II.

linked to the armed group, such as community leaders, could be an option.[205] A crucial element in this situation would be to ensure the principle of equality of arms, in the sense that both the defence and prosecution should possess similar resources and experience. An additional measure to ensure a fair trial could be the reliance on a concept, which is quite common among civil law jurisdictions, in which the judge, realising that the defence is being carried out inadequately, has the power to intervene on the defendant's behalf, recognising the hyposufficiency of the part.[206]

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[205] As Provost puts it, this approach is neither novel nor restricted to non-state armed groups. He also proposes as an additional safeguard the use of external control mechanisms, in the form of 'ombudsman systems', carried out by influential individuals in the community. René Provost, *Rebel Courts: the administration… supra* at 1, 135, 184-188.

[206] As a way of example, the Brazilian Procedural Criminal Code states, in Portuguese:
*'Art. 156. A prova da alegação incumbirá a quem a fizer, sendo, porém, facultado ao juiz de ofício:*
*I – ordenar, mesmo antes de iniciada a ação penal, a produção antecipada de provas consideradas urgentes e relevantes, observando a necessidade, adequação e proporcionalidade da medida;*
*II – determinar, no curso da instrução, ou antes de proferir sentença, a realização de diligências para dirimir dúvida sobre ponto relevante.*
*(...)*
*Art. 383. O juiz, sem modificar a descrição do fato contida na denúncia ou queixa, poderá atribuir-lhe definição jurídica diversa, ainda que, em conseqüência, tenha de aplicar pena mais grave.*
*§ 1o Se, em conseqüência de definição jurídica diversa, houver possibilidade de proposta de suspensão condicional do processo, o juiz procederá de acordo com o disposto na lei.*
*§ 2o Tratando-se de infração da competência de outro juízo, a este serão encaminhados os autos.*
*(...)*
*Art. 384. Encerrada a instrução probatória, se entender cabível nova definição jurídica do fato, em conseqüência de prova existente nos autos de elemento ou circunstância da infração penal não contida na acusação, o Ministério Público deverá aditar a denúncia ou queixa, no prazo de 5 (cinco) dias, se em virtude desta houver sido instaurado o processo em crime de ação pública, reduzindo-se a termo o aditamento, quando feito oralmente.*
*§ 1o Não procedendo o órgão do Ministério Público ao aditamento, aplica-se o art. 28 deste Código.*
*§ 2o Ouvido o defensor do acusado no prazo de 5 (cinco) dias e admitido o aditamento, o juiz, a requerimento de qualquer das partes, designará dia e hora para continuação da audiência, com inquirição de testemunhas, novo interrogatório do acusado, realização de debates e julgamento.*
*§ 3o Aplicam-se as disposições dos §§ 1o e 2o do art. 383 ao caput deste artigo.*
*§ 4o Havendo aditamento, cada parte poderá arrolar até 3 (três) testemunhas, no prazo de 5 (cinco) dias, ficando o juiz, na sentença, adstrito aos termos do aditamento.*
*§ 5o Não recebido o aditamento, o processo prosseguirá.'*

'Art. 156. Proving the allegation will be the responsibility of whoever raises it, however, the judge *ex officio* will be able to:
I – order, even before the beginning of the criminal prosecution, the early production of evidence considered urgent and relevant, observing the need, adequacy and proportionality of the measure;
II – determine, during the investigation, or before handing down a sentence, the carrying out of measures to resolve doubts on a relevant point.
(...)

### *5.C. Limited international personality*

The final possible scenario would be a NIAC, regulated either by CA3 of by APII, involving a NSAG vested with limited international legal personality. In these instances, the line between an unrecognized state and an NSAG becomes progressively blurry. While on one hand, entities such as the Republics of South Ossetia and Abkhazia are unrecognised states, during the Russo-Georgian armed conflict of 2008, which involved both *de facto* governments, the laws applicable to the conflict fought between their forces and the Georgian government were those of APII, *i.e.* the norms relative to NIACs, considering that despite their state-like format they are still *de iure* part of Georgia.[207]

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Art. 383. The judge, without modifying the description of the fact contained in the accusation or complaint, may assign it a different legal definition, even if, as a result, he will have to apply a more serious penalty.
§1 If, as a result of a different legal definition, there is the possibility of proposing a conditional suspension of the process, the judge will proceed in accordance with the provisions of the law.
§2 In the case of an infringement of the jurisdiction of another court, the case will be forwarded to that court.
(...)
Art. 384. Once the evidentiary investigation is concluded, if it deems a new legal definition of the fact to be appropriate, as a result of existing evidence in the records of an element or circumstance of the criminal offense not contained in the indictment, the Public Prosecutor's Office must add the charge or complaint, within a period of 5 (five) days, if, as a result of this, the process was initiated in a public criminal action, reducing the addendum to a term, when made orally.
§1 If the Public Prosecutor's Office does not proceed with the addition, art. 28 of this Code shall be applied.
§2 Once the accused's defender has been heard within 5 (five) days and the addition has been admitted, the judge, at the request of either party, will designate a day and time for the continuation of the hearing, with the examination of witnesses, new interrogation of the accused, carrying out of debates and judgment.
§3 The provisions of §§ 1 and 2 of article 383 are applicable to the *caput* of this article.
§4 If there is an addition, each party may call up to 3 (three) witnesses, within a period of 5 (five) days, with the judge, in the sentence, being bound by the terms of the addition.
§5 If the addition is not received, the process will continue.' (author's translation)

About the role of the judge in Brazilian criminal law, see for example, Aury Lopes Jr., *Direito Processual Penal* (17th edn, Saraiva 2020); Nestor Távora and Rosmar Rodrigues Alencar, *Curso de Direito Processual Penal* (12th edn Editora Juspodium 2017); and Eugênio Pacelli, *Curso de Processo Penal* (22nd edn Atlas Gen 2018). About the application of *mutation libelli* and *emendation libelli pro reo* in Brazilian criminal law, see Fabio Bergamin Capela, *Correlação entre Acusação e Sentença* (Juruá Editora 2008).

[207] Independent International Fact-Finding Mission on the Conflict in Georgia, *Report – Volume II* (2009), 300-301.

Perhaps the most emblematic example of a situation of state's territorial displacement and the acquisition of limited international personality, making a NSAG's territory a *quasi*-independent state, is the case of Kosovo. After declaring its independence in July 1990, and finally repelling Yugoslav rule and control from most of its territory, NSAGs that would late form the Kosovo Liberation Army gained even more autonomy than it previously had as an Autonomous Province of Yugoslavia.[208] From that point until its partially recognised independence in 2008, Kosovar Albanians retained territorial control, enacted further state-like functions with international support, such as electing a president in May 1992,[209] and enacting a constitution on September 1991,[210] being for all domestic purposes the *de facto* government, despite the assistance of the Kosovo Force (KFOR), and later, the United Nations Interim Administration in Kosovo (UNMIK). [211] In such a situation it is possible to observe the somewhat linear progression from a NSAG performing governmental functions in *lieu* of the now absent state, to an actor in the international community. As their rule became consolidated, and their diplomatic efforts intensified, more and more states would recognise it as full-fledged state, engaging in bilateral treaties and joining international organisations such as the Centre European Free Trade Agreement (CEFTA). Finally, by accepting stabilisation missions such as the United Nations Interim Administration Mission in Kosovo (UNMIK), and the European Rule of Law Mission (EULEX), the country paved its

[208] Milena Sterio, *The Right to Self-determination Under International Law 'Selfistans', Secession, and the Rule of the Great Powers* (Routledge 2012), 116-118; and James Summers, Kosovo: From Yugoslav Province to Disputed Independence *in* James Summers (ed), *Kosovo: A Precedent?* (Martinus Nijhoff Publishers 2011), 7-10.
[209] Stephen Tierney, The Long Intervention in Kosovo: A Self-Determination Imperative? *in* James Summers (ed), *Kosovo: A Precedent?* (Martinus Nijhoff Publishers 2011), 270.
[210] *ibid.*, 269.
[211] Milena Sterio, *The Right to Self-determination… supra* at 208, 116-126; and Kaiyan H. Kaikobad, Another Frozen Conflict: Kosovo's Unilateral Declaration of Independence and International Law *in* James Summers (ed), *Kosovo: A Precedent?* (Martinus Nijhoff Publishers 2011), 55-85.

way to European Union membership, being one of the candidate countries in the organisation's future enlargement plan.

In such instances, these groups, which act in a highly organised fashion progressing gradually towards a role of a true (albeit unrecognised) government are not only subjected to IHL obligations, but also become addressees of IHRL.[212] Furthermore, by maintaining a centralised government, oftentimes with institutions fundamental to a constitutional order such as a parliament and a complex judicial body, these groups are capable of complying with the most stringent requirements for a 'regularly constituted' court, which are the jurisdictional and structural norms contained in a constitution.

For instance, the Republic of Somaliland, an unrecognised state located in the territory of Somalia, has established, in its 2000 Constitution, its governmental institutions including a bicameral legislature – comprised of the House of Representatives functioning as the lower house, and the House of Elders as the upper house,[213] as well as the judiciary branch of the government.[214] The same can be said about Kurdish courts established in northern Iraq, which follow a similar structure of the Iraqi judicial system, are based on a legal instrument which also mirrors Iraq's Judicial Organisation Law, and consists of a fairly elaborate architecture, including specialist courts and a Court of Cassation.[215] Another noteworthy example is, once again, the Kosovar judicial system. From the enactment of the Kaçanik Constitution of 1990 to the establishment of UNMIK's Joint Interim

[212] Daragh Murray, *Human Rights Obligations…supra* at 60, 27-29.
[213] Constitution of the Republic of Somaliland, Chapter Two – The Structure of the State. The Constitution of Somaliland (2005 *Somaliland Law*) <http://www.somalilandlaw.com/somaliland_constitution.htm#Chapter2> accessed 25 March 2023.
[214] *ibid*., Chapter Four – Part One: The Judiciary.
[215] René Provost, *Rebel Courts: the administration… supra* at 1, 373-385.

Administrative Structure (JIAS), when the Constitution was disbanded, the Kosovar government ruled with its own legislation and governmental structures, including a two-year period between the end of the Kosovo war and the creation of JIAS, when Kaçanik was the only constitutional instrument applicable in the territory.[216]

Additionally, because the principle of domestic prescriptive jurisdiction is no longer applicable to these organisations, except for its international dimension, they are no longer bound by their parent state's legislation, particularly its criminal and administrative legislation regarding military misconduct. Consequently, these entities would be free to, respecting the limits set by IHRL, IHL, and ICL, enact their own legislations, including norms dictating the criminal conducts both in common situations and in relation to an armed conflict. These norms would still need to respect the rules inherent to the legislative process to be considered valid and effective, in accordance with these groups' constitutional documents, much like it is expected from a recognised government.[217]

Despite being a contentious topic, the recognition of judicial bodies of NSAGs in the two previous scenarios, there are cases in which courts of highly advanced state-like groups have been repeatedly accepted as dispensing legitimate justice by international courts. For instance, the ECoHR has recognised the possibility of NSAGs' courts to be established by law, if these tribunals were to fulfil the appropriate requirements

[216] See generally, James Summers, Kosovo: From Yugoslav Province… *supra* at 108.
[217] Unfortunately, due to the complexity of this fascinating topic, as well as the brevity of this thesis, law-making by non-state armed groups will not be addressed. Refer instead to the fundamental works of Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Non-State Actors: Engaging Armed Groups in the Creation of International Humanitarian Law', (2012) 37(1) *Yale Journal of International Law*, and Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', (2005) 16(4) *European Journal of International Law.*

> *the word "tribunal" used in the French text of Article 5 (court) and other Articles of the* [European] *Convention, in particular Article 6 (tribunal), refers in the first place to a body "established by law" satisfying a number of conditions which include independence, particularly vis-à-vis the executive, impartiality, the duration of its members' terms of office and guarantees of a judicial procedure* (…) *In certain circumstances, a court belonging to the judicial system of an entity not recognised under international law may be regarded as a tribunal "established by law" provided that it forms part of a judicial system operating on a "constitutional and legal basis" reflecting a judicial tradition compatible with the Convention, in order to enable individuals to enjoy the Convention guarantees* (…).[218]

This decision is consistent with the Court's previous sentence in *Cyprus v. Turkey*.[219] In both cases, *Ilaşcu* in relation tribunals convened by the Moldavian Republic of Transnistria and *Cyprus v. Turkey* in relation to the Turkish Republic of Northern Cyprus, the contested courts were established under the administration of governing bodies from organisations that function as states, although not being recognised as such by the international community. It is important to highlight that, despite addressing only the IHRL competence of these courts, the reasoning applied by the ECoHR can be extended to matters of IHL and ICL, as the requirements for the establishment of courts under IHRL are considerably more rigorous than those found in IHL, and even more restrictive than those found in ICL, as seen in Chapter 4.

Support for these NSAG courts is also demonstrated, directly or indirectly, in several reports and declarations from international bodies, such as the explicit recommendation made in 2011 by the International Commission of Inquiry for Libya, directed to the National Transitional Council of Libya (a NSAG acting as the *de facto* government of Libya until the hand-over of power to the elected National Assembly in 2012) requiring the organisation

[218] European Court of Human Rights, *Case Ilaşcu and others v Moldova and Russia*, supra at 24, par. 460.
[219] European Court of Human Rights, *Case of Cyprus v Turkey*, *supra* at 25, pars. 234-237.

> '[t]*o conduct exhaustive, impartial and public investigations into all allegations of international human rights law and international humanitarian law violations, and in particular to investigate with a view to prosecuting cases of extrajudicial, summary or arbitrary executions and torture with full respect of judicial guarantees'*.[220]

## 6. Conclusion

The discussion on the existence of a legal basis for non-state prosecution is significantly less developed than its detention counterpart. Much of this is due to the focus on the more contentious aspects of prosecutions both in IHL and IHRL, such as the capacity of rebel groups to establish courts that observe the legal requirements of these two systems. While this issue is different it is also intrinsically linked to the analysis of the legal authorisation, which oftentimes generates confusion not only in academia, but also among those that elaborate the rules themselves.[221]

In IHL the debate is dominated by those who defend that NSAGs do not possess authorisation to conduct their own trials. This reasoning is based on the idea that these tribunals would be inherently incapable of complying with the required judicial guarantees (which reinforces the confusion between authorisation and judicial guarantees), or yet that the absence of state practice and *opinio iuris* reflect the prohibition of such acts in NIACs.

Whereas the opponents of the existence of an authorisation in IHL use this silence as a demonstration of rejection, the scholarship that supports an implied

[220] United Nations Human Rights Council, *Report of the International Commission… Libyan Arab Jamahiriya supra* at 98, par. 269. Similarly, the United Nations Security Council has reaffirmed the obligation of all parties to the conflicts in Yemen and Libya to hold accountable all those responsible for violations of international humanitarian and human rights law. The fact that this language is adopted when referring to both conflicts does not seem to be accidental, as in both scenarios the non-state armed groups involved not only have claimed statehood by being the rightful government of their parent country, but also because these groups have a quite sophisticated structure. See, for instance the recent resolutions, in relation to Libya, United Nations Security Council, Res. 2564 (2021); Res. 2571 (2021); Res. 2647 (2022); Res. 2656 (2022); and particularly Res. 2644 (2022). In relation to Yemen, see United Nations Security Council, Res. 2564 (2021); and Res. 2624 (2022).

[221] Jonathan Somer, 'Jungle Justice: passing…' *supra* at 17, 674-675.

authorisation uses the same evidence, which includes the recognition that rebel courts do exist and trials are in fact conducted, as an argument to support an alleged authorisation. A good evidence of such authorisation being the Updated Commentary to the First Geneva Convention (GCI), which attempts to demonstrate via limited evidence, that such practice is accepted among states and international tribunals. Despite the arguments made by the ICRC, their analysis lacks the rigour of the original commentary of 1952, arguing in favour of a rule using outlying case-law, state practice and *opinion iuris*, even if taking into account the most recent developments in the area. Notwithstanding the laudable intentions from the authors of the Updated Commentary, the result is only an aspirational interpretation.

The use of the *travaux préparatoires* to the GC and their APs to reinforce the existence of an implicit authorisation also fails to provide substantial evidence. If, on one side, the discussion of the matter was not properly captured, rendering any attempt to understand the motivation of the original drafters impossible, the discussion that took place during the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts points to a highly contentious discussion. The *travaux préparatoires* show that, while a number of delegations recognised that the penal prosecution provisions in APII should apply equally to all parties to a NIAC, another group was strongly opposed to any suggestion of equality, due to the fear of legitimisation of NSAGs. As such, it is impossible to verify an authorisation. Instead, what can be seen is a compromise of not addressing the matter in detail, leaving it for states to decide important aspects such as the meaning of ‘law’.

The final strand of arguments by those that defend the existence of an implicit authorisation for prosecutions by armed groups in NIACs revolves around the

principles of equality of belligerents and effectivity. While both arguments are in principle correct; the laws applicable to NIAC bind all parties to the conflict, and obligations must not be made impossible to be complied with; these points seem to ignore the fact that a detailed analysis of all the evidence surrounding the topic point for neither a prohibition nor an authorisation on either part under IHL. By remaining silent on the matter, IHL provides opportunities to both sides – states and NSAGs – to comply with the obligations set by the Conventions, as well as APII.

By not expressly regulating prosecutions in NIACs, IHL creates a permissibility that allows domestic norms, such as the criminal legislation of a government, their administrative and disciplinary norms for the armed forces, as well as other municipal sources, to regulate these procedures. Since NSAGs yet to displace governmental authority from part of the state's territory are still bound, via domestic prescriptive jurisdiction, to the pre-established laws of the land, it is clear that these trials and courts should follow closely those of the state against which there are fighting. This is not to say that there is not a degree of flexibility involved in the enforcement of these norms, considering the unequal capabilities of both sides. Even the most fragile states possess vast capabilities in comparison to NSAGs that do not exercise consistent territorial control, and as such, their ability to comply with the established legislation is also different. It is submitted that instead of adopting an inflexible set of rules that risk compromising these NSAGs willingness to comply with national and international norms, under the argument of strict legality, a better approach would be to allow for a gradual implementation of rules, considering each groups' capacity to realistically comply, while preserving the core obligations of each norm. To do otherwise would be to risk a complete alienation of these entities, with grave consequences for captured fighters and the civilian population in contact with

them. Chapter 6 will explore in greater detail the application of the gradual application of judicial guarantees, for NSAGs subjected to domestic prescriptive jurisdiction under IHL.

Aside from the limited scope of *Drittwirkung* and horizontal effect theories on the application of IHRL norms to third parties, it is understood that this legal framework is only applicable to NSAGs in case of a legal vacuum, that forces such organisations to take over obligations that a state possesses but, due to the presence of said actors, cannot comply with. In these specific situations, that border definitions of sovereign statehood, IHL would apply directly to armed groups, and consequently affect the manner in which their justice system is run. Consequently, a more restrictive approach to prosecutions and the execution of sentences should be followed, usually requiring the creation of an entire court system, with judges in possession of prerogatives such as irremovability and independence from the executive branch of government.

In these situations of limited statehood, NSAGs would be free from governmental legislation and courts, as they are no longer subjected to domestic prescriptive jurisdiction, and would be allowed to develop their own norms for prosecutions under IHRL, IHL and ICL. Nevertheless, just as fully recognised states, their new legislation should operate in accordance with the international legal standards, under the risk of enforcing unfair trials and summary executions.

Concerning the different theories in relation to the legal basis for prosecutions by NSAGs in domestic law, these are often intermingled with the discussion on the existence of this legal basis in international legal regimes. This discussion is remarkably different from the one regarding detention rules. The problem of locating

the authorisation for prosecutions, is only compounded by the contradicting structure devised in CA3 and article 6(2) of APII, which is further complicated by the clunky construction of article 8(2)(c)(iv) in Elements of Crimes. As demonstrated, a careful evaluation of the content of the Protocols Additional to the GCs provides an acceptable explanation. As the Protocols were drafted as supplementary documents to the Conventions, not intending to modify the application of the relevant norms in CA3, the only possible interpretation would be that the requirement for a 'regularly constituted court' keeps being applicable to higher threshold NIACs, with the guarantees presented in article 6(2) clarifying the obligations in all forms of NIAC.

The difference between the two regulatory frameworks would then merely be in terms of the scope of these obligations, consistently with the inherent increase in requirements for the application of the APII. In relation to the criminalisation of the war crime of passing sentences and carrying out executions without a judgement by a properly established and affording the required judicial guarantees, it is submitted that, much like in relation to the threshold for the application of NIAC norms, instead of developing a new category for NSAG courts, one that is considered by many commentators to require be significantly lower standards than that of APII, the result of the text of article 8(2)(c)(iv) and its explanation in the Elements of Crimes, it is the result of poor drafting. The threshold found in the Rome Statute in this sense, is similar to the one in CA3, while relying on the clarification provided by APII.

Understanding the location of these different provisions in the general regulation of prosecutions by NSAGs is crucial to understand the positive and negative points of the different theories that attempt to negotiate a coherent framework for such conducts. The traditional theory that proposes that NSAGs are inherently incapable of complying with the requirements set in CA3(1)(d) as it interprets the concept of

regular constitution in IHL as analogous to its IHRL counterpart does not only fail to acknowledge that this IHRL definition is posterior to that of CA3 (as the ICCPR was drafted in 1954 while the GCs were negotiated in 1949), but it also ignores the associated risks of denying NSAGs a crucial element to war-fighting, which has the potential to encourage, instead of prevent, extrajudicial executions and other forms of punishment based on inquisitorial trials denying fair trial guarantees that would be otherwise perfectly compliable.

Two very popular theories that are often verified simultaneously are the equality of belligerents' approach and the theory based on customary international law. While both of these theories provide important contributions to the comprehension of the issue, they are prejudiced by their limited view and somewhat superficial analyses.

Part of the scholarship considers that NSAGs should be allowed establish courts, usually also defending these groups' right to apply their own legislation, as a matter of equality, as states should be able to do the same. As it has been established in previous chapters, the principle of equality of belligerents is respected under IHL with the absence of regulation by this branch of law, as both state and NSAGs are in neither authorised nor prohibited from prosecuting individuals in NIACs. On the other hand, in relation to domestic law, this principle is not applicable, and despite the importance of providing the means for all parties to a conflict to be able to discharge their obligations and to perform crucial acts, this should not be construed as deriving from a domestic principle of equality, as domestic law is inherently biased towards the state that has enacted this law.

This theory is usually complemented by the idea that existing *opinio iuris* and *praxis* on the topic of prosecutions in NIAC support the idea that these courts can be

convened by armed groups as a matter of customary international law. While it is true that there are prominent examples of states' acceptance to these courts, these are quite limited and often generate circular arguments in which a new manifestation references one of the few previous examples as a representation of an inexistent trend. A prominent example of this is the Updated Commentary on the GCI, which not only relies on few sources, but is also over reliant in doctrine to point out the existence of a customary international norm, when in reality, all that these academic sources references are the same manifestations of states that are originally referenced in the first place.

A ground-breaking development on the matter was the series of decisions from Swedish courts in relation to the *Sakhanh* case, addressing the legality of executions carried out by a member of a NSAG in the Syrian conflict. While the Stockholm's District Court, followed by the Svea Court of Appeal, boldly recognised the necessity and legitimacy of courts convened by rebels as means of accountability for war crimes, to enforce discipline, and more generally to maintain order and safety in NSAG-controlled areas, the District Court falls short from providing a feasible answer. Instead of recognising the inherent lack of capacity of these groups in comparison to the state, the District Court, basing itself on Klamberg's advice as *amicus curiae*, preferred to maintain a hard line on the creation of courts by NSAGs, only permitting judgements dependent on circumstances outside the control of such groups, such as the existence of already established state courts in armed groups territory, and the existence of regime judges among their population. It is important to highlight that, as mentioned above, this decision relied heavily on Klamberg's submission to the Court during the trial. The Court apparently mistook the scholar's opinion on a suggested policy to be adopted by states with the existing dominant

understanding among states, international courts and academia, a fact that is recognised by the author himself and that greatly detract from the conclusion adopted by the District Court and maintained by the Court of Appeals.

The last explored theory, proposes that, in order to avoid a slippery slope in relation to the relaxation of the concept of 'regularly constituted' courts, states should adopt a hard stance against the prosecution of members of their armed forces, and possibly of civilians, captured by NSAGs, while relaxing the legal basis for prosecution for these groups' own members. By defending such a differentiation, this approach effectively creates a differentiation of courts *ratione personae* in violation of the principle of equality. In addition to violating a basilar principle of law, this approach in practicality would most likely fail to produce effects due to its expected deep unpopularity among those adversely affected by it. At the same time that NSAGs would be uncapable of prosecuting criminals from the opposing party while being prosecuted, their own members that have committed violations of IHL or war crimes would also be put under considerably unfavourable conditions in relation to relation to members of the state's armed forces, civilians, or even their brothers-in-arms captured by the enemy.

The general failure in providing an acceptable interpretation of the existing norms reinforces the necessity for a solution that at the same recognises the discrepancy between state and non-state capabilities in an armed conflict and protects the rights that were originally envisioned in international law. In order to provide such a solution, it was necessary to refer to concepts that were developed during previous chapters, such as the idea of a sliding-scale of obligations being applicable, on a case-by-case basis, to the relevant provisions of IHL and IHRL, as well as the ideas of prescriptive jurisdiction and NSAGs *pseudo* international legal personality.

Another crucial element in this analysis is the differentiation between domestic law norms, and their relationship with the aforementioned sliding-scale of obligations. While norms in a legal system can be divided, among other categories, into constitutional norms, those typifying criminal conduct, and those describing the procedural aspects of justice, it is possible to observe that the capacity of NSAGs to comply with these norms vary greatly. Constitutional norms relating to the judiciary would be inherently uncompliable by any NSAG not vested with international legal personality, and therefore should not be taken as indispensable unless in the higher levels of capacity. On the other hand, typification and procedural norms set up by a state can be progressively complied with by insurgent groups.

As a consequence of this differentiation in relation to existing branches of domestic law, the proposed definition divides the applicability of prosecution norms in three stages, the first two being equivalent to the CA3 and APII thresholds, with the last stage being independent of the regulatory regime to which the NIAC is subjected. By analysing the particularities of the case using the applicable legal framework as a backdrop, it is possible to determine if the norms that are being complied with, and the manner in which compliance is taking place, are sufficient to protect to the fullest extent possible the core obligations that are represented by the existing domestic law, as well as the informing regimes of IHL, IHRL and ICL.

The application of this sliding-scale approach will be further explored in Chapter 6, when addressing the judicial guarantee requirements that must be met by NSAGs in order to grant the accused parties a fair trial.

# Chapter 5 – Procedural safeguards in detention

The previous chapter addressed the legal basis for detention and prosecution, and more broadly the legal basis of judicial procedures brought against an individual by Non-state armed groups (NSAGs). The current chapter will address the procedural safeguards involved in detention when carried out by these entities. Analysing the legal basis for prosecution before addressing the procedural safeguards in detention might seem counterintuitive, but, considering that there is somewhat of an overlap between both areas, this build up was necessary. The revision of security detentions, the main concern in a Non-International Armed Conflict (NIAC), could be considered a hybrid operation, relying not only in the authorisation to detain, but also in the capacity to adjudicate by NSAGs. And as such, the discussion will at times veer into a grey area between detention and prosecution.

Aside from revision, other procedural aspects of detention will be examined. As it was established in Chapters 3 and 4, the legal basis for detentions and prosecutions by NSAGs lies on the domestic legislation of their parent state, via domestic prescriptive jurisdiction, being consequently subjected to International Human Rights Law (IHRL). The list of safeguards can then be extracted from established provisions in this field of law. In this chapter the required safeguards will be identified. They are prohibition of arbitrary detentions, the obligation to inform the detainee of the reason for their arrest, the obligation to present a criminal detainee before a judge in order to have their case tried by a court, the obligation to provide the opportunity for a detainee to request a review of their detention, the obligation to release the detainee when the grounds for their detention cease to exist, and the obligation to provide reparations for arbitrary detentions. Considering the subject of this thesis, this last

aspect will not be addressed, as it would mean a significant deviation from the main topic of research.

## 1. The interplay between IHRL and International Humanitarian Law of NIAC in the detention framework

Before discussing procedural regulations in detention applicable to NSAGs, it is necessary to explore the interplay between the two main areas of international law of which this framework is comprised. While the treaty-based regulation of detentions in NIACs is found in Common Article 3 (CA3) and article 5 (with references to articles 4 and 7) of Additional Protocol II (APII), the content of these norms in relation to procedural safeguards is extremely limited. For instance, while APII is seen as a clarification and expansion of the provisions found in CA3, representing the higher threshold of NIACs, the provisions relating to detention, while developing, indeed, on the treatment of detainees and detention standards, are completely silent in relation to procedural safeguards. The reference to procedural safeguards under the law of NIACs, must then rest within CA3. Though explicitly acknowledging the application of the principle of humane treatment to persons under detention, *'Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by* (…) *detention* (…) *shall in all circumstances be treated humanely* (…)',[1] the provision does not provide any substantive norm regulating detention.

This absence of an explicit regulation, much like the absence of an explicit authorisation, has led to some inaccurate considerations, including the idea that, based on the *Lotus* principles, sovereign states may apply, by way of analogy, the

[1] Common Article 3 to the Geneva Conventions of 1949 (Common Article 3).

rules of detention in NIACs to those found in International Armed Conflict (IAC),[2] to a more extreme interpretation of said principle, defending that in NIACs there is nothing preventing the arbitrary detention of civilians.[3] Not only these interpretations of the *Lotus* principles are anachronic, but in relation to this last proposition, numerous instances of state practice exist to reaffirm the necessity of a regulatory framework in detention. For instance, in accordance to the International Committee of the Red Cross (ICRC) Customary Study, not only more than 70 states were found to criminalise arbitrary detentions – under varying terminologies that include unlawful/illegal confinement/detention, as well as arbitrary or unnecessary detention – in armed conflicts, but there was found no contrary practice regarding the condemnation of arbitrary detentions in NIACs, with the UN Commission on Human Rights condemning 'detentions' in Yugoslavia and 'arbitrary detentions' in Sudan in resolutions that were adopted without a vote.[4]

Arguably a more reasonable approach that is adopted, proposes that the law of NIACs does not address procedural safeguards in detention, leaving the matter unregulated, and, simultaneously the importance of other areas of international law, most prominently, IHRL.[5] Another part of the scholarship, though, builds up on this interpretation, and, while acknowledging that CA3 does not provide any explicit

[2] Ryan Goodman, 'Editorial Comment: The Detention of Civilians in Armed Conflict' (2009) 103(48) *The American Journal of International Law*, 50.
[3] Laura Lopez, 'Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts' (1994) 69(4,5) *New York University Law Review*, 935-936.
[4] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules* (Cambridge University Press 2009), 347-348.
[5] See, for example, Marco Sassòli and Laura Olson, 'The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts' (2008) 90(871) *International Review of the Red Cross*; Agnieszka Jachec-Neale, 'Status of prisoners of war and other persons deprived of their liberty' *in* Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Law* (Cambridge University Press 2007), 313; Jelena Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence' (2005) 87(858) *International Review of the Red Cross*, 377; Ashley S. Deeks, 'Administrative Detention in Armed Conflict' (2009) 40(3) *Case Western Reserve Law Journal of International Law*, 413,435-436.

framework for detention, it does so implicitly.[6] This interpretation of the article consider that the prohibition on arbitrary detentions – which is also termed as unlawful confinement – is a direct consequence of the principle of humane treatment, although no reasoning is adopted to justify the position.[7] This point of view is equally shared with the ICRC, that also does not fundament its position.[8]

This position is finally developed even further by authors such as Lawrence Hill-Cawthorne, who provide an explanation on the relationship between the prohibition of arbitrary deprivation of liberty and the principle of humane treatment.[9] According to the author, the right to liberty and the protection from arbitrary deprivation of liberty have always been recognised by international law as inherent to the condition of being human, which can be seen by the numerous international documents reinforcing these rights.[10] Consequently, Hill-Cawthorne establishes that arbitrary deprivation of liberty would qualify as inhumane treatment.[11] Not only that, but, the principle of humane treatment is elaborated as an open rule, being a blanket for many other obligations, which would allow for this characteristic to work favourably in

[6] For example, Cordula Droege, '"In truth the leitmotiv": the prohibition of torture and other forms of ill-treatment in international humanitarian law' (2007) 89(867) *International Review of the Red Cross,* 535-538; and Johanna Dingwall, 'Unlawful Confinement as a War Crime: The Jurisprudence of the Yugoslav Tribunal and the Common Core of International Humanitarian Law Applicable to Contemporary Armed Conflicts' (2004) 9(2) *Journal of Conflict and Security Law*, 149-152.
[7] *ibid.*
[8] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian… Volume I: Rules supra* at 4, 344.
[9] Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflicts* (Oxford University Press 2016), 76-83; See also, Zelalem Mogessie Teferra, 'National security and the right to liberty in armed conflict: The legality and limits of security detention in international humanitarian law' (2016) 98(3) *International Review of the Red Cross*.
[10] For example, Article 9, Universal Declaration of Human Rights. 10 December 1948; Article 9(1), International Covenant on Civil and Political Rights (ICCPR). 16 December 1966; Article 7(3) ACHR; Article 6 ACHPR; and Article 5(1) ECHR.
[11] Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 9, 78-79.

relation to the interpretation of obligations, in light of the evolution of international law.[12]

A legitimate fear coming from the vagueness of the principle of humane treatment, as seen in CA3, is that such a flexible norm could be dilated to the point to which it would cover obligations that were not intended originally, in effect rendering the rule ineffective.[13] Notwithstanding such concerns, it rests clear that construing the prohibition of arbitrary deprivation of liberty out of the principle of humane treatment is not one of these cases. It is established that the principle of humane treatment is an underlying principle of all the Geneva Conventions (GCs) and their Protocols, what necessarily includes CA3.[14] It is important to note that many of the obligations that are unequivocally derived from said principle do relate to arbitrary detentions, for example, the prohibition of arbitrary detentions is relevant in the combating of torture,[15] or enforced disappearances.[16] Not only that, but the principle of humane treatment is considered to be applied in any instances of detention, including detention camps and elsewhere, *'*[…] *to anyone deprived of liberty under the laws and authority of the State* […]*'*,[17] and being applicable in both international and

[12] *ibid.*, 79.
[13] *ibid.*
[14] Iris van der Heijden, 'Other Issues Relating to the Treatment of Civilians in Enemy Hands' *in* Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions – A Commentary* (Oxford University Press 2015), 1247.
[15] As can be seen, for instance, in United Nations General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment, A/RES/3453, 9 December 1975.
[16] United Nations Human Rights Committee, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development – Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/7/2, 10 January 2008.
[17] United Nations Human Rights Committee, *General Comment No. 21* Article 10 (Humane Treatment of Persons Deprived of Their Liberty, 10 April 1992, par. 2. Similarly, *General Comment No. 29: Article 4: Derogations during a State of Emergency*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, par. 13(a).

NIACs.[18] In this sense, the prohibition of arbitrary detentions would be compatible with the opposing principles of humane treatment/military necessity that permeates IHL. While it is submitted that arbitrarily depriving someone of their liberty is a violation of the principle of humane treatment and a disproportionate application of the principle of military necessity, lawful detentions are consistent with humanity considerations, as this category of detentions is considered to be legal in a scenario of more protective rules (i.e. under IHRL), as well as demonstrate the proportional application of the principle of military necessity.[19] Finally, the respect for the principle of humanity in relation to individuals deprived of their liberty is to be applied at all times, being a non-derogable customary international law norm.[20]

Having established the relationship between the principle of humane treatment and the prohibition of arbitrary deprivation of liberty, it is necessary to determine which substantive rules regulate such prohibition, or a *contrario sensu*, which legal framework allows for non-arbitrary detentions. Although the minimalistic and open-ended nature of the provisions in CA3 seem to point at an absence of any clear regulation, a systematic interpretation of the GCs and Protocols may yield at least one defined rule. An analysis of the *travaux préparatoires* of the Conventions, seems to point out that, contrary to the established idea that CA3 is a self-contained set of rules within the rules, it actually interacts with other norms of the Conventions, the principle of humane treatment contained in it being famously described by Jean

[18] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian… Volume I: Rules supra* at 4, 306-307.
[19] Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 9, 79.
[20] United Nations Human Rights Committee, *General Comment No. 29… supra* at 17. See Also Sandra Krähenmann, 'Protection of Prisoners in Armed Conflict' *in* Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (4th ed Oxford University Press 2021), 409.

Pictet as the leitmotiv of the Geneva Law.[21] Consequently, this principle is referenced not only in CA3, but also in many other provisions, applicable both in IACs and NIACs.[22] The different presentation of the principle of humane treatment, varying according to the instrument, was therefore a choice, due to

> *the fact that four Conventions were being drawn up, each providing protection for a particular category of war victims, it might be thought that each Convention should merely have referred to the relevant category of victims. It was thought preferable, however, in view of the indivisible nature of the principle proclaimed, and its brevity, to enunciate it in its entirety and in an absolutely identical manner in all four Conventions.*[23]

From this idea of an indivisible principle, being approached under a different, and more relevant, angle in accordance to each Convention, one can legitimately assume that every mention of this principle only part of its whole representation, all these provisions being applicable to any instances of an armed conflict.[24] In this sense, the provisions relating to the principle of humanity, found in Additional Protocol I (API) and APII,[25] would not be seen as part of the same construction found in the Conventions, as these were drafted 26 years later. Rather, the references to said principle in the Protocols can be seen as an addition to the original norm, laying

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[21] Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 9, 79-80; Similarly, Johanna Dingwall, 'Unlawful Confinement as a War Crime…' *supra* at 5, 148-152; and Cordula Droege, '"In truth the leitmotiv…' *supra* at 5, 516.

[22] For instance, article 12(1), Geneva Convention I; article 12(2), Geneva Convention II; article 13(1), Geneva Convention III; articles 5(3), 27(1) and 127(1), Geneva Convention IV; articles 10(2) and 75(1), Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I). Geneva, 8 June 1977; articles 4(1), 5(3), and 7(2), Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II). Geneva, 8 June 1977.

[23] Jean Pictet (ed), *The Geneva Conventions of 12 August 1949 – Commentary – vol. III* (ICRC 1958), 38.

[24] Similarly, see Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 9, 79-82. Hill-Cawthorne's approach, however, proposes that the identical nature of the provisions allows for the interpretation of the principle of humane treatment in Common Article 3 with reference to similar provisions in the Geneva Conventions, in accordance to article 31(1) of the Vienna Convention on the Law of Treaties, considering that they are part of the context in which Common Article 3 is inserted in.

[25] Articles 10(2) and 75(1), Additional Protocol I; articles 4(1), 5(3), and 7(2), Additional Protocol II.

out additional obligations specific to situations of armed conflicts in the context of colonial domination and alien occupation, and high-threshold NIACs.

Considering, therefore, the presented aspect of the principle of humane treatment found in article 27 of the Fourth Geneva Convention (GCIV), affirming that protected persons *'*[…] *shall at all times be humanely treated* […] *However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war'* a clear norm regulating detention in the context of an armed conflict can be identified.[26] As it is widely accepted, the expressions 'measures of control and security' encompass a series of actions, that aim at restricting one's freedom of action, ranging from mild restrictions, such as the registering and reporting periodically to the police authorities, carrying identity documents, a ban on the carrying or weapons, to more severe, such as the necessity of seeking authorisation to change residences, restriction on the access to certain areas, and more general restrictions on the freedom of movement.[27] The most severe form of such restrictions being assigned residence and internment, both species of the wider genre of detention.[28] It can be thus concluded that the principle

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[26] *'Article 27*
*Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.*
*Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.*
*Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.*
*However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.'*

[27] Jean Pictet (ed), *The Geneva Conventions of 12 August 1949 – Commentary – vol. IV* (ICRC 1958), 207.

[28] Jean Pictet (ed), *The Geneva Conventions… vol. IV ibid.*; Also, Laura M. Olson, 'Admissibility of and Procedures for Internment' *in* Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions – A Commentary* (Oxford University Press 2015), 1329-1330; Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 9, 41; Knut Dörmann and Sylvain Vité,

of humane treatment allows for the detention of persons, such deprivation of liberty is necessary in the context of an armed conflict, any other instance of detention being considered a violation of the principle.[29]

It must be said that, outside situations of an armed conflict, the detention of persons for criminal matters in order to maintain public order and the normal functioning of institutions by NSAGs, is also possible, in case of a total displacement of state authority and the consequent need to provide continuing protection to the civilian population. In these situations, the regulation of such activities is to be found in NSAG, when in accordance with IHRL norms and customs and other relevant international legal regimes, as well as when respecting the requirements of publicity, predictability and proportionality, as seen in Chapter 4.

Despite providing this clear rule, i.e., that detentions under the law of NIACs can only be carried out in the context of an armed conflict, the principle of humane treatment, stemming from the GCs, as well as the remaining norms found in CA3 do not provide any other substantive obligation in respect to these instances of deprivation of liberty. As discussed in Chapter 3, the legal basis for detention in NIACs rests ultimately in domestic law, the only rule being that these norms should not allow for detention deemed to be arbitrary, a definition that must be informed by IHRL. Thus, the construction of a framework of detention by NSAGs must necessarily be analysed under the latter legal framework, which also provides for a more detailed set of procedural obligations, which derive from both universal and regional documents.

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'Occupation' *in* Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (4th ed Oxford University Press 2021) 313.

[29] Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 9, 81.

From the many documents that impose procedural safeguards for detention, perhaps the International Covenant on Civil and Political Rights (ICCPR) provides the most authoritative description, which laid the ground for subsequent instruments.[30] The Covenant, in its article 9 provides a blueprint of obligations to be observed in the course of detention

> *Article 9*
>
> *1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*
>
> *2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*
>
> *3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.*
>
> *4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*
>
> *5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.*

The article provides us with a series of obligations, that are roughly organised by paragraphs: 1) the obligation not to carry out arbitrary detentions, which are to be established by law; 2) the obligation to inform the detainee of the reason for their arrest and, in case of criminal detentions, to inform the charges to be brought against them; 3) the obligation to present a criminal detainee before a judge in order to have

[30] Similar treaties addressing the procedural safeguards for detention include the American Convention on Human Rights. 22 November 1969; the European Convention on Human Rights. 4 November 1950; the African Charter of Human and Peoples' Rights. 27 June 1981; and the Arab Charter on Human Rights. 22 May 2004.

their case tried by a court; 4) the obligation to provide the opportunity for a detainee to contest the lawfulness of their detention, both at the beginning of their detention, as well as periodically; 5) the obligation to release the detainee when the grounds for their detention cease to exist; and 6) the obligation to provide reparations for arbitrary detentions. Considering the scope of the present research, the obligation to provide reparations will not be discussed.

It is important to mention that, with the exception of paragraph 3 and part of paragraph 2 of article 9, which refer to criminal detention, the specific safeguards found in paragraphs 2 to 5 are to be applied to all persons deprived of their liberty,[31] including during NIACs.

### 2. Non-arbitrariness of detention

The procedural safeguard against arbitrary detentions is the only requirement that is present both in IHRL and IHL. The customary character of CA3, and consequently the customary status of the prohibition against arbitrary deprivation of liberty, as a consequence of the principle of humane treatment, is recognised both in the doctrine, as stated above, and in international jurisprudence.[32] While the prohibition of this conduct is considered to integrate the *corpus* of IHL, the substantive norms defining the content of the term 'arbitrary' in NIACs is not present in IHL treaty or custom, these requirements resting under IHRL.[33]

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[31] United Nations Human Rights Council, *General Comment no. 35, Article 9 (Liberty and security of person,* CCPR/C/GC/35, 16 December 2014, par. 4.

[32] See for example, International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, par. 98; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgement of 27 June 1986, pars. 216-220.

[33] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian… Volume I: Rules supra* at 4, 347-352.

These requirements can be divided in two substantial norms, in accordance to article 9(2) of ICCPR, consisting in the obligation of respecting the right to liberty as the norm, with instances of deprivation of liberty being the exception; and that all persons should be protected against arbitrary deprivation of liberty, under any terminology. Although being the standard, the right to liberty is not an absolute right, its curtailing being allowed as long as in accordance with the rule of law.[34]

While many regional treaties follow the construction proposed in ICCPR, creating an open obligation against arbitrary deprivation of liberty,[35] the approach adopted by the European Convention on Human Rights (ECHR) was to present an exhaustive list of permissible grounds. According to the Convention, no one shall be deprived of their liberty excepting in cases of

> *(a) the lawful detention of a person after conviction by a competent court;*
>
> *(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;*
>
> *(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*
>
> *(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*
>
> *(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*
>
> *(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*[36]

[34] United Nations Human Rights Council, *General Comment no. 35… supra* at 31, par. 10.
[35] Article 7(3), ACHR; Article 6 ACHPR; Article 8, Arab Charter of Human Rights.
[36] Article 5(1), ECHR.

Aside from these hypotheses, that must also obey a procedure prescribed by law, other cases of detention are not allowed in peacetime.[37] As can be verified above, none of the situations described in article 5(1) allow for security detentions, and as such, *a priori*, detentions in NIACs are not allowed. The list of permissible situations for detention under the ECHR is understood as a representation of the broader principle of the prohibition of arbitrary detentions, comprehending not only the obligation to respect the right to liberty, but also the obligation to protect individuals under state party jurisdiction from such detentions.[38]

The different approaches in relation to detention in NIACs, the narrower one based on IHL and regulating detentions necessary as a result of war; and the broader protection under IHRL, that applies to detentions in all instances, are also reflected in different sets of requirements. While IHL detentions need only to be non-arbitrary, the requirements flowing from IHRL, as exemplified by article 9(1) of ICCPR, '[n]*o one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'*,[39] are non-arbitrariness and lawfulness of the detention.[40] It is important to stress that these two requirements do not operate separately, but simultaneously, and might eventually overlap, allowing for a situation in which a

[37] Sangeeta Shah, 'Detention and Trial' *in* Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds.), *'International Human Rights Law'* (3rd edn. Oxford University Press 2018), p. 256.
[38] Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 9, 118; Also, European Court of Human Rights, *Case of A. and Others v. The United Kingdom*, application no. 3455/05, Judgement of 19 February 2009, par. 164; and *Case of Storck v. Germany*, application no. 61603/00, Judgement of 16 June 2005, par. 102.
[39] And reproduced in article 7(2) and (3), ACHR; article 6, ACHPR. The ECHR and the Arab Charter of Human Rights, on the other hand, only explicitly restate the lawfulness requirement, in articles 5(1) and 8, respectively.
[40] Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 9, 118.

detention is a violation of the law but it not arbitrary, or be legally allowed but at the same time arbitrary, or both unlawful and arbitrary.[41]

Under IHRL is the notion of arbitrariness is difficult to be defined,[42] The requirement of non-arbitrariness was restated by the Human Rights Committee (HRC) in its General Comment 35 (GC35). As proposed above, a detention may be in accordance to the pertinent domestic law but still be considered to be arbitrary, as this concept cannot simply be equated with 'against the law'.[43] An arbitrary detention is to be understood as a detention that is inappropriate, unjust, unpredictable or that does not follow the due process of law, being equally unreasonable, unnecessary and disproportionate.[44] In order to determine the absence of these elements, both the scholarship, as well as jurisprudence has determined the need of a proportionality assessment. This assessment aims to verify if the detention is necessary as a measure, fit to achieve the intended aim, in the specific situation, as well as if there are other, less invasive methods.[45] In terms of jurisprudence, the HRC has decided, for example, that an instance of detention could be considered arbitrary if it is not necessary in every instance of the deprivation of liberty.[46] In the case of *Chaparro Álvarez and Lapo Íñiguez vs. Ecuador*, the Inter-American Court of Human Rights (IACHR) provided a highly detailed analysis of the arbitrariness assessment,

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[41] United Nations Human Rights Council, *General Comment no. 35… supra* at 31, par. 11.
[42] Federica Favuzza, 'It was the Best of Times, It was the Worst of Times' *in* Paul De Hert, Stefaan Smis and Mathias Holvoet (eds), *Convergences and Divergences Between International Human Rights, International Humanitarian and International Criminal Law* (Intersentia 2018), 166.
[43] United Nations Human Rights Council, *General Comment no. 35… supra* at 31, par. 12.
[44] United Nations Human Rights Council, *General Comment no. 35… ibid.;* Also, Human Rights Committee, *Hugo van Alphen v. The Netherlands*, communication no. 305/1988, 23 July 1990, par. 5.8; and *Fongum Gorji-Dinka v. Cameroon*, communication no. 1134/2002, 17 March 2005, par. 5.1.
[45] Sangeeta Shah, 'Detention and Trial' *supra* at 37, 257. See also, Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 9, 119-120.
[46] Human Rights Committee, *A. v. Australia*, communication no. 560/1993, 3 April 1997, par. 9.2

> *In brief, it is not sufficient that every reason for deprivation or restriction of the right to liberty is established by law; this law and its application must respect the requirements listed below, to ensure that this measure is not arbitrary: (i) that the purpose of the measures that deprive or restrict liberty is compatible with the Convention. It is worth indicating that the Court has recognized that ensuring that the accused does not prevent the proceedings from being conducted or evade the judicial system is a legitimate purpose;47(ii) that the measures adopted are appropriate to achieve the purpose sought; (iii) that they are necessary, in the sense that they are absolutely essential to achieve the purpose sought and that, among all possible measures, there is no less burdensome one in relation to the right involved, that would be as suitable to achieve the proposed objective. Hence, the Court has indicated that the right to personal liberty supposes that any limitation of this right must be exceptional, and (iv) that the measures are strictly proportionate, so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or excessive compared to the advantages obtained from this restriction and the achievement of the purpose sought. Any restriction of liberty that is not based on a justification that will allow an assessment of whether it is adapted to the conditions set out above will be arbitrary and will thus violate Article 7(3) of the Convention.*[47] (footnotes omitted)

Additionally, in case the detention of an individual would lead to a violation of human rights, or it is the result of a violation, this detention may also be considered to be arbitrary.[48] Among the violations that have led to the arbitrariness of their related detention, detentions carried out due to political views, based on ethnic origin, racial profiling, without further evidence, as well as when there is gross violations of fair trial have been verified in jurisprudence.[49]

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[47] Inter-American Court of Human Rights, *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Judgement (preliminary objections, merits, reparations and costs), 21 November 2007, par. 93. Similarly, see *Case of Acosta Calderón v. Ecuador*, Judgement (merits, reparations, and costs), 24 June 2005, par. 111; *Case of Palamara Iribarne v. Chile*, Judgement (merits, reparations, and costs), 22 November 2005, par. 197; *Case of García Asto and Ramírez Rojas v. Peru*, Judgement (preliminary objection, merits, reparations, and costs), 25 November 2005, pars. 106, 128; *Case of the 'Juvenile Reeducation Institute' v. Paraguay*, Judgement (preliminary objections, merits, reparations, and costs), 2 September 2004, par. 228. Also, European Court of Human Rights, *Case of Saadi v. The United Kingdom*, application no. 13229/03, Judgement of 29 January 2008, par. 70.

[48] Sangeeta Shah, 'Detention and Trial' *supra* at 37, 257. See also, Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 9, 121.

[49] Sangeeta Shah, 'Detention and Trial', *supra* at 37, 257.

As pointed out above, differently from other regional systems, that adopt an open provision on the prohibition of arbitrary detentions, the ECHR adopts an exhaustive list of hypotheses, which is not compatible with the concept of security detention. Whilst the ECtHR recognises that in instances of IACs, internment is to be regulated by IHL,[50] in order for detention operations to be legally performed in an NIAC, the state involved in the conflict must derogate from the provisions in article 5. According to article 15 of the ECHR, derogations may happen in exceptional circumstances, including *'time of war or other public emergency threatening the life of the nation'*,[51] with article 5 not being included in the list of non-derogable rights of the treaty.[52] This understanding, of the necessity of a derogation to carry out non-arbitrary detentions in NIACs, has been consistently accepted in the European Court of Human Rights jurisprudence.[53]

This situation is particularly concerning in regard to NSAGs, as, in a scenario of an NIAC taking place in a state signatory of the ECHR, these groups would only be allowed to take prisoners legally if the state against which they are fighting against has derogated from its article 5 obligation, in turn, relieving these groups from their obligations. This problem exists both in lower intensity conflicts, under the regulation of CA3, as well as in higher intensity conflicts, when the threshold of APII is reached, and when the NSAG has completely displaced state authority in a part of this state's territory but is still subjected to domestic prescriptive jurisdiction. While in CA3 conflicts the NSAG would not fulfil the organisational requirement to be recognised

[50] See generally, ECoHR, *Case of Hassan v. The United Kingdom*, Application no. 29750/09, Judgment of 16 September 2014.
[51] Article 15(1), ECHR.
[52] *Ibid.*, Article 15(2).
[53] For instance, *'Lawless v. Ireland (No. 3)'*, application no. 332/57, Judgement of 1 July 1961, pars. 19-22; *'Ireland v. The United Kingdom'*, application no. 5310/71, Judgement of 18 January 1978 pars. 194-196; and *'A. and Others v. The United Kingdom'*, *supra* at 38, par. 172.

as possessing limited international legal personality, in APII conflicts, the limited international legal personality of these groups would still not allow them to derogate from article 5 of the Convention, in the absence of a state derogation, even if exercising state-like functions in a large territory. This is due to the fact that, considering the temporary and the *de facto* status of this international personality, its subject competence is restricted to the activities it performs – such as policing, domestic lawmaking, the provision of health and educational services etc – in opposition to the complete competence possessed by a sovereign state.[54]

A practical example of the peculiarity of NIACs in relation to the ECHR can be verified in the NIAC fought between Ukraine and the Peoples' Republics of Donetsk and Luhansk.[55] Although both the Peoples' Republics of Donetsk and Luhansk held a significant part of Ukrainian territory – roughly the cities that gave their names – since the spring of 2014, exercising complete authority and control over this territory, it was not until 5 June 2015, when the government of Ukraine filed a notice of derogation to articles 5,6,8 and 13 of the ECHR,[56] that detentions carried out by both Republics and Ukraine can be considered legal under IHL. While the legal authorisation for such operations came only in June of 2015, there has been numerous reports of mass arrests and prosecutions in the armed groups' territory

[54] Gus Waschefort, 'The pseudo legal personality of non-state armed groups in international law' (2011) 36 *South African Yearbook of International Law,* 233-235. Also, Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016), 121-122.

[55] Geneva Academy of International Law, *'Non-International Armed Conflicts in Ukraine'* (The Rule of Law in Armed Conflict Project, 12 September 2017) <http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-ukraine#collapse4accord> accessed 09 June 2019.

[56] Permanent Representation of Ukraine to the Council of Europe, Note Verbale, N° 31011/32-119/1-678, 5 June 2015.

even before starting from the moment these groups have taken control of Luhansk and Donetsk.[57]

### 3. Right to be informed of the reasons of detention

The right to be informed of the reasons for detention is a crucial element to challenge the deprivation of liberty, and it is also a fundamental element in case of future prosecution.[58] Initially, it must be said that despite not being referenced in the GCs, this right was included in API, in the elaboration of the concept of fundamental guarantees.[59] Due to the fact that API is only applicable to IACs, being an established rule in IHL, its scope of application is restricted to IACs, with no equivalent being found in the regulation of NIACs either as positive or customary norm.[60] While not being mentioned by IHL in relation to NIACs, this right is widely elaborated under IHRL. The right to be promptly informed of the reasons for one's detention is elaborated in similar wording by the ICCPR,[61] the American Convention on Human Rights (ACHR),[62] the ECHR,[63] as well as in instruments such as the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules),[64] the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN Body of Principles),[65]

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[57] Pavel Kanygin, 'Locked up in Donbass: A look at the mass arrests and torture of civilians in Donetsk and Lugansk' (*Medusa Project/Novaya Gazeta* 7 March 2016) < https://meduza.io/en/feature/2016/03/07/locked-up-in-the-donbas> accessed 09 June 2019.
[58] Daragh Murray, *Human Rights Obligations…supra* at 54, 237.
[59] Article 75(3), Additional Protocol I.
[60] See for instance the ICRC's Customary International Law Study, when discussing rule 99 on deprivation of liberty.
[61] Article 9(2), ICCPR.
[62] Article 7(4), ACHR.
[63] Article 5(2), ECHR.
[64] United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), Res. 70/175, 17 December 2015, rule 119(1).
[65] United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Res. 43/173, 9 December 1988, principles 10, 11(2), 12(1)(a) and (2).

and the Copenhagen Principles and Guidelines on the Handling of Detainees in International Military Operations (Copenhagen Principles).[66]

A particularly important element of this right is the obligation, contained by some of these documents, that the information must be conveyed in a language that is understood by the detainee. This is stated in ECHR,[67] the UN Body of Principles,[68] and the Copenhagen Principles.[69] While not being explicitly stated in the ICCPR, the ACHR, and the Mandela Rules, this requirement could be reasonably subsumed from a concurrent interpretation of the right to be informed of the reasons of one's detention and the general prohibition of discrimination,[70] as these documents are clear in prohibiting discrimination based on language. This understanding is also reinforced by the HRC in a few cases, like *Griffin v. Spain*[71] and *Hill v. Spain*.[72] This understanding is particularly important when considering situations like the Islamic State's defeat in Iraq and Syria. The worldwide reach of the NSAG recruiting network brought mujahideen from many different countries, approximately 12,000 of those being currently detained in Kurdish-led detention centres.[73]

Finally, it is relevant to the context of NSAGs to analyse the notion of 'prompt', which is a main element of the right. While on one hand, the inability to comply with this obligation would invariably configure a situation of arbitrary detention, it is necessary

[66] The Copenhagen Process on the Handling of Detainees in International Military Operations: The Copenhagen Process: Principles and Guidelines (Copenhagen Principles), October 2012, principle 7.
[67] Article 5(2), ECHR.
[68] United Nations Body of Principles…Detention or Imprisonment, *supra* at 65, principle 14.
[69] Copenhagen Principles, *supra* at 66, principle 7, and commentaries 7.1 and 7.2.
[70] Present in article 2(1) of ICCPR; and article 1(1) of the ACHR; rule 2(1), Mandela Rules.
[71] Human Rights Committee, *Griffin v. Spain*, Communication No. 493/1992, 4 April 1995, CCPR/C/53/D/493/1992, pars. 2.3, 9.2.
[72] Human Rights Committee, *Hill v. Spain*, Communication No. 526/1993, 2 April 1997, CCPR/C/59/D/526/1993, pars. 2.2, 12.2.
[73] Stavros Atlamazoglou, 'The US's Syrian partners are still guarding hundreds of ISIS prisoners' (*Business Insider* 26 April 2022) <https://www.businessinsider.com/us-kurdish-partners-still-guarding-isis-prisoners-in-syria-2022-4?r=US&IR=T> accessed 26 February 2023.

to consider the operational and logistical factors involved. The definition of promptness for the purposes of this obligation was elaborated by IHRL and was later adopted directly by IHL.[74] Bearing that in mind, the jurisprudence has adopted a contextual approach, with periods as short as two days being considered to be unreasonable.[75] Certainly, the notion of promptness is substantially different when comparing a state and an armed group, as envisioned by Bond. Safety and logistical considerations, particularly when considering the necessity of an interpreter, could mean that a significant period might elapse until the information can be appropriately disclosed. This period should nevertheless be considered appropriate, as suggested in the Copenhagen Principles.[76]

### 4. Review of detention

A particularly sticking point in the discussion on security detentions by NSAGs concerns the feasibility of an appropriate review. It is important to note that there is somewhat of an overlap between security and criminal detention. Nevertheless, considering that the review of criminal detentions is the consequence of a judicial procedure, only security detentions will be addressed here. Criminal detentions will be discussed in Chapter 6.

Considering the high degree of subjectivity and volatility involved in this particular type of operations, it is not surprising how important it is for a security detainee to challenge the grounds for their detention. While on one hand, the law of IAC provides clear rules for the internment of civilians, the same cannot be said in

[74] Michael Bothe, Karl Joseph Partsch and Waldermar A. Solf, *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd ed Martinus Nijhoff 2013), 520, par. 2.16.
[75] Human Rights Committee, *Ismailov v. Uzbekistan*, Communication No. 1769/2008, 28 April 2011, CCPR /C/101/D/1769/2008, par. 7.2
[76] Copenhagen Principles, *supra* at 66, principle 7, and commentaries 7.1 and 7.2.

relation to combatants. This is due to the fact that POW treatment is given on the basis of status. In this sense, once an individual is identified as a combatant, it is assumed that their interment is necessary throughout the armed conflict.[77] The internment of civilians, on the other hand, is described, both in GCIV and API.[78] This discussion was not carried out to the law of NIAC. As demonstrated in Chapter 3, positive international law is silent in relation to the legal regime for detentions in NIAC, and the existing customary rules for IAC cannot be extended to the former type of armed conflict. This lack of regulation explicit regulation has prompted the ICRC to issue an institutional position on the issue, in which the organisation lays down a set of rules drawing from the existing rules in the law of IAC, as well as in IHRL.[79] Leaving the regulation of security detentions in NIAC in the hands of IHRL, with IHL serving a complementary role as a guidance in certain situations, particularly the abovementioned articles 43 and 78 of GCIV and article 75 of API, as well as CA3, seems to be the best alternative.[80]

Relying on IHRL means that there is extensive regulation available in relation to the right of access to *habeas corpus*,[81] which is applicable in these scenarios. This is a positive outcome, considering the right to *habeas corpus* is considered to be non-

[77] Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 9, 56-57, 124; Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Kluwer 1987), 258; and Geoffrey Corn, 'Enemy Combatants and Access to *Habeas Corpus*: Questioning the Validity of the Prisoner of War Analogy' (2007) 5(2) *Santa Clara Journal of International Law*, pp. 258-259.
[78] Articles 43, 78, Geneva Convention IV; and article 75(3), Additional Protocol I.
[79] International Committee of the Red Cross, *Internment in Armed Conflict: Basic Rules and Challenges – International Committee of the Red Cross (ICRC) Opinion Paper* (ICRC November 2014).
[80] Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 9, 124. Also, Jelena Pejic, 'Procedural principles and safeguards…' *supra* at 5, 377-378. While Pejic's reasoning relies on IHL being assisted by IHRL, she does recognise the importance of complementary between legal regimes, taking into account the International Court of Justice advisory opinion on *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.
[81] For instance, see article 9(4), ICCPR; article 6(7), ACHR; article 5(4), ECHR; and article 14(6), Arab Charter of Human Rights.

derogable by both the HRC and the IACHR.[82] The HRC has demonstrated particular concern for security detentions, for example, in its GC35. Security detentions are considered to present *'severe risk of arbitrary deprivation of liberty'* as it is not the priority measure to address threats, which could be dealt with by the justice system or less invasive options.[83] Taking into account its exceptionality, the Committee held that security detentions should not last longer than absolutely necessary, and all the provisions found in article 9 of ICCPR must be respected at all times.[84] That is not to say that the Committee finds this detention regime *a priori* arbitrary. The Opinion recognises that, as long as the guarantees of ICCPR are respected and there is close supervision of its length, security detentions can be a useful to address *'a present, direct and imperative threat'*.[85] The importance of the reviewing process is reiterated in the Copenhagen Principles,[86] which, by their nature, appears to be of special relevance when considering the context of detention in NIAC both envisioned by the document and the situation being currently analysed.

### *4.A. Reviewing procedure*

The reviewing procedure for security detentions is divided into an initial review and as many periodic reviews as necessary, throughout the duration of the detention. In both cases, as prescribed by article 9(4) of ICCPR, the judging authority should receive the application without delay, in order to being the inquiry process.[87] Much like the discussion on the definition of the term 'prompt', as seen in 2.2, different

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[82] United Nations Human Rights Committee, *General Comment No. 29: Article 4: Derogations during a State of Emergency*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, par. 40; and Inter-American Court of Human Rights, Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87 (30 January 1987).
[83] United Nations Human Rights Council, *General Comment no. 35… supra* at 31, par. 15.
[84] *ibid.*
[85] *ibid.*
[86] Copenhagen Principles, *supra* at 66, principle 12.
[87] Louise Doswald-Beck, *Human rights in times of conflict and terrorism* (Oxford University Press 2012), 270; see also Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 9, 124-125.

courts have provided a widely different time frames when considering what would cease to be considered 'without delay' or its equivalents.[88] In relation to period review, its necessity stems from the need to access the changing of circumstances of someone's detention. It is once again related to the procedures found in articles 43 and 78 of GCIV, named reconsideration in the former and appeal in the latter.[89] It is also a guarantee that was not transposed to the law of NIAC, neither by treaty nor custom.[90] The right to a periodic review is also not to be found in IHRL treaty law, the confirmation of this right being found only in jurisprudence. The fact that IHRL treaties do not mention to period review does not mean that they are not allowed, particularly taking into account that no provision determines that there should only be an initial review. Considering that the teleology of the norms regulating the right to *habeas corpus* intends to prevent arbitrary detentions, it is only logical that in situations where the reasons for detention may cease to exist, periodic reviews on the grounds for detention must be carried out judiciously. This interpretation is in line with the understanding on several international tribunals on the matter.[91]

In this sense, as detentions in NIAC are regulated by domestic law, the review procedure will be carried out in accordance with what is stipulated by the state's legislation. Nevertheless, if domestic law does not contain such a provision, in order to guarantee an appropriate level of oversight, at a minimum such reviews should be

[88] See, for example, Human Rights Committee, *Torres v. Finland*, Communication No. 291/1988, 5 April 1990, CCPR /C/38/D/291/1988; European Court of Human Rights, *Case of S., V. and A. v. Denmark* (2018), App. 35553/12, 22 October 2018; and Inter-American Commission on Human Rights, *Thomas Nativi and Fidel Martinez v. Honduras*, Report No. 7/87, Case No. 7864, 28 March 1987.

[89]Articles 43 and 78, Geneva Convention IV.

[90] Daragh Murray, *Human Rights Obligations…supra* at 54, 237; Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 9, 130; and Jelena Pejic, 'Procedural principles and safeguards…' *supra* at 5, 388-389.

[91] For instance, see United Nations Human Rights Council, *General Comment no. 35… supra* at 31, par. 12; Human Rights Committee, *A. v. Australia, supra* at 46, par. 9.4; and *Lebedev v. Russia*, application no. 4493/04, Judgement of 25 October 2007, pars. 78-79.

carried out at least twice a year, in line with articles 43 and 78 of GC IV.[92] Despite its soft law status, a useful guideline can be found in the Copenhagen Principles, in the commentary to principle 12. The document recognises that a limited availability of personnel, operation necessities, and resource constraints may prevent detainees' applications, but despite that, reviews should occur as often as necessary, preferably every six months. Additionally, the commentary considers that the period between reviews should depend on the thoroughness of the process, as well as the apparent prospects of a change in the detainee's situation.[93] Recognising that a lack of resources and the thoroughness of previous reviews is especially useful for NSAGs in a more volatile scenario, as the opportunities for such review and the extent of the inquiries involved can vary sensibly throughout an individual's detention.

### *4.B. Nature of the reviewing body*

Following the trend seen in Chapter 4, perhaps the most divisive element of the review procedure relates to the nature of the court carrying out said review. While the provisions on security detention under IHL, which, once again are not applicable beyond an interpretive instrument, determine that the reviewing procedure may be undertaken by a court or an administrative board,[94] the understanding on the matter under IHRL varies, yet it is still considerably stricter.

Rodley and Pollard have claimed that under IHRL the authorities analysing an *habeas corpus* must invariably be a formally constituted court.[95] This view is

[92] Jelena Pejic, 'Procedural principles and safeguards…' *supra* at 5, 389; Federica Favuzza, 'It was the Best …', *supra* at 42, 168.
[93] Copenhagen Principles, *supra* at 66, principle 12, and commentary 7.3.
[94] Articles 43 and 78, Geneva Convention IV; Jean Pictet (ed), *The Geneva Conventions… vol. IV supra* at 27, 368-369.
[95] Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (Oxford University Press 2009), 466.

reinforced by decisions such as HRC on *Torres v. Finland*,[96] where the Committee found that, to preserve objectivity and independence, the legality of a detention can only be determined by a court. Though this position seems to put an invincible obstacle on any effort to review a security detention by NSAGs, save for the rare instances of pseudo international legal personality, a more detailed analysis provides for a more nuanced approach. In his authoritative study on the text of ICCPR, Nowak has addressed the definition of 'court' for the purposes of the right to *habeas corpus*. Although agreeing with Rodley and Pollard on the need for a court, after analysing the discussions in the *travaux préparatoires* to the ICCPR, and interpreting article 9(3) in combination of article 14(1), Nowak concluded that there is significant leeway in the definition of a court. Whilst conceding that under article 14(1), the normal definition of a court would mean a body that is *'competent, independent and impartial* […] *established by law'*, he also recognises that in certain circumstances, a body that was not created following the formal procedure found in national law could also be deemed appropriate.[97] In the scholar's view, some administrative authorities that are clearly independent could be considered to justify the requirements of article 14.[98] This means that the definition of 'court' is not limited to ordinary courts, but also includes *'special courts, including administrative, constitutional and military courts'*.[99] His position is further reinforced by decisions such as the HRC case of *Vuolanne v. Finland*, when the Committee found that the right to have a punishment reviewed by a court of law could also be fulfilled by a military court.[100] Nowak is careful, though,

[96] Human Rights Committee, *Torres v. Finland*, *supra* at 88, par. 7.2.
[97] Manfred Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (2nd rev ed N.P. Engel 2005) 319.
[98] *ibid.*
[99] *ibid.*, 235-236.
[100] Human Rights Committee, *Vuolanne v. Finland*, Communication No. 265/1987, 2 May 1989, CCPR /C/35/D/265/1987, pars. 9.3-9.6.

to stress that *'It goes without saying that the independence of the judiciary* is not always *assured with military courts revolutionary tribunals and similar special courts'* (emphasis added).[101]

This position seems to find some support in the scholarship.[102] This is also the position adopted in documents such as the UN Body of Principles, and the Copenhagen Principles. While the former implicitly acknowledges the possibility of having the lawfulness of detention challenged before *'a judicial or other authority'*,[103] the latter explicitly determines that *'*[t]*he authority conducting the review must be objective and impartial but not necessarily outside the military'*.[104]

### *4.C. Procedural requirements*

Finally, a couple of relevant aspects regarding the procedures of the reviewing body must be discussed. Once again, the right to challenge one's detention must be complied with without delay. This is the third moment in which an expeditious procedure is a vital safeguard in security detention. In its first instance, the right to be informed of the reasons of detention promptly is important for the detainee to prepare a challenge to their detention. Additionally, the right to have your application review without delay is two-fold. As mentioned above, it comprises of the promptness in allowing for the challenge to be brought up, but it also related to the promptness in reaching a decision on said challenge.[105] This obvious statement, which sounds like an academic technicality, afford significant protection to security

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[101] Manfred Nowak, *U.N. Covenant on Civil… supra* at 97*,* 320.
[102] Perhaps the most prominent example is René Provost newest book, *Rebel Courts: The administration of Justice by Armed Insurgents* (Oxford University Press 2021), 200-202. See also Federica Favuzza, 'It was the Best …', *supra* at 42, 168; and Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights – Cases, Materials, and Commentary* (3rd ed Oxford University Press 2013), 384.
[103] United Nations Body of Principles…Detention or Imprisonment, *supra* at 65, principle 32.
[104] Copenhagen Principles, *supra* at 66, Principle 12 and commentary 12.2.
[105] Louise Doswald-Beck, *Human rights in times… supra* at 87, 270.

detainees. Reports of indefinite security detentions by states are a commonality, sometimes the result of an oversight by detention authorities, and others as a deliberate measure.[106] If this is such a problematic issue with states, the situation is even more concerning in relation to NSAGs as evidenced by the widespread arbitrary detentions carried out in Donetsk and Luhansk. By April 2021, it is believed a total of 300-400 individuals remained under a form of security detention (called 'administrative arrest' by the Donetsk People's Republic, and 'preventive detention' by the Luhansk People's Republic), some of them since the start of hostilities.[107] The definition of an undue delay is once again varied between different tribunals,[108] but again, the issue is mainly contextual. The complexities of conducting such review can be in some ways mitigated by some adaptations, while upholding the fairness of the procedure. An extremely pertinent example of this is provided by Murray. The author proposes in his book that resources such as video links could be used to bring detainees before a judge as soon as possible.[109] This idea, proposed in 2016, has proven feasible during the pandemic, when courts all over the world successfully adopted such virtual proceedings to preserve social distancing.

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[106] Jack Khoury, 'Longest-serving Palestinian Security Prisoner Freed After 40 Years in Israeli Prison' (*Haaretz*, 5 January 2023) <https://www.haaretz.com/israel-news/2023-01-05/ty-article/.premium/longest-serving-palestinian-security-prisoner-freed-after-40-years-in-israeli-prison/00000185-80af-d4ba-add5-a8ff2bc50000> accessed 06 March 2023; n/a, 'Israel releases second longest-serving Palestinian prisoner' (*Aljazeera*, 19 January 2023) <https://www.aljazeera.com/news/2023/1/19/israel-releases-second-longest-serving-palestinian-prisoner> accessed 06 March 2023; Harun al-Aswad, 'Syria: Families wait desperately for loved ones's release after prison amnesty' (*Middle East Eye*, 4 May 2022) <https://www.middleeasteye.net/news/syria-prison-amnesty-families-wait-loved-ones-release> accessed 06 March 2023; and, regardless of status, probably the most prominent indefinite detainees are the ones held in Guantanamo Bay, see n/a, 'The Guantanamo Docket' (*The New York Times*, 23 February 2023) <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html> accessed 06 March 2023.

[107] United Nations Office of the High Commissioner for Human Rights, Arbitrary detention, torture and ill-treatment in the context of armed conflict in Eastern Ukraine – 2014-2021, 2 July 2021. Similarly, in relation to Syrian conflict, Stavros Atlamazoglou, 'The US's Syrian partners…' *supra* at 73.

[108] See for instance, Human Rights Committee, *Khudyakova v. Russia*, application No. 13476/04, 8 January 2009, par. 97; European Court of Human Rights, *Case of Kadem v. Malta*, (2003), app no. 55263/00, par. 44-45; and Inter-American Commission on Human Rights, *Thomas Nativi and Fidel Martinez v. Honduras, supra* at 88.

[109] Daragh Murray, *Human Rights Obligations…supra* at 54, 239, fn. 245.

Lastly, it is important to address the role of legal assistances during the procedure. Regardless of any flexibility afforded to the procedure, the right to a fair trial must not be violated, especially in the form of denial of an effective representation. A few instruments, such as the Copenhagen Principles, proposes that, during the review procedure of a security detention, the right to legal representation is not guaranteed, being exercised only *'*[w]*here feasible'*.[110] While it is true that instruments such as the Copenhagen Principle are non-binding and aimed at multinational operations, proposals such as this have the potential to encourage the violation of rights, particularly in scenarios in which detention authorities are already prone to cut corners. As explained in Chapter 4, some adaptations can be made in order to allow for judicial or quasi-judicial procedures to occur, as long as there is no prejudice to the detainee's defence. The example that was submitted, which is also applicable in the current scenario, is the use of court clerks or other similar legal professionals in the absence of qualified lawyers, as long as the designated defender possesses similar experience, knowledge, and resources as the prosecution. In this sense, there is no doubt that any review that is carried out in the absence of an effective legal representation would not comply with the requirements expected from the procedure, configuring a situation of arbitrary deprivation of liberty in case the detention is sustained. This understanding is based on the fact that, regardless of the absence of explicit norms in this sense under IHRL and the law of NIAC, IHRL soft law and jurisprudence has repeatedly highlighted that the right to legal assistance is a core element of the rights to fair trial and liberty of person.[111]

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[110] Copenhagen Principles, *supra* at 66, Principle 12 and commentary 12.4

[111] For instance, see United Nations Body of Principles…Detention or Imprisonment, *supra* at 65, principles 17-18; Mandela Rules, *supra* at 64, rule 41(3), (5); and United Nations Human Rights Council, *General Comment no. 35… supra* at 31, pars. 10, 32, 37-38. Supporting this position, see

## 5. Release of detainees

The final procedural safeguard for detention to be addressed in this chapter, the obligation to release detainees once the reasons for their detention cease to exist, has been crystallised as a custom, being an aspect of the prohibition of arbitrary deprivation of liberty that operates regardless of the context of the armed conflict.[112] This interpretation seems to be accurate, considering the similar obligation found in IHRL: *'Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'.*[113] Despite its customary status, the obligation to release is not subjected to an end-point, such as the end of the conflict, mentioning only that the detention must cease when the reasons for it no longer exist.[114] An additional concern, relates to the provisions of APII that regulate prosecutions, stating that the provisions for the treatment of detainees facing prosecution, found in article 5 and 6, be applied to individuals whose detention persists after the cessation of hostilities.[115] This provision appears to recognise that security detention may continue even after the end of the conflict, and consequently the reasons for the detention. Nevertheless, once the NIAC ceases to exist, all detention is to be regulated by exclusively by IHRL.[116] In this case, the need for continued reasons for detention undoubtedly

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Jelena Pejic, 'Procedural principles and safeguards…' *supra* at 5, 388; and Federica Favuzza, 'It was the Best …', *supra* at 42, 168.

[112] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian… Volume I: Rules supra* at 4, 348. Also, Jelena Pejic, 'Procedural principles and safeguards…' *ibid.*; and 'The protective scope of Common Article 3: more than meets the eye' (2011) 93(881) *International Review of the Red Cross*, 219.

[113] Article 9(4), ICCPR.

[114] Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 9, 97.

[115] Article 2(2), Additional Protocol II.

[116] Lawrence Hill-Cawthorne, *Detention in Non-International… supra at* 9, 131.

arises, which consequently would make the maintenance of a non-criminal detentions in non-state occupied territory inviable.

Another requirement, also found in APII, relates to the conditions of detainee release, and determines that all the necessary measure to ensure the safety of the detainee must be taken in the moment of their release.[117] While this provision does not find an equivalent in IHRL, it would be inconsistent with the obligation to respect and protect the right to security of persons, or even the right to health in the case of a wounded detainee, not to behave otherwise.[118] It is submitted that in most cases this obligation can be easily fulfilled by releasing the detainees in or nearby a populated area, but that in cases of release of detainees in need of special care – such as children or wounded persons – it might be necessary to rely on an intermediary, such as the ICRC, in order to provide an appropriate and safe release.[119]

## 6. Conclusion

In order to observe the minimum required standards for detention, a NSAG must look beyond the law of NIAC. As the vast majority of NSAGs are bound by their parent state's legislation via domestic prescriptive jurisdiction, most of the procedural safeguards are to be found in IHRL. This provides a problem in adapting the standards that are expected of entities that possess vast resources, territory, and personnel to organisations that rely on considerably meagre assets. While this imbalance might look insurmountable, with a degree of flexibility, and at the same time caring to preserve rights' core obligations, most safeguards can be reasonably complied with. Compliance with these rules must not be presumed, though.

[117] Article 5(4), Additional Protocol II.
[118] Daragh Murray, *Human Rights Obligations… supra* at 54, 254.
[119] *ibid.*

Considering the wide spectrum of NSAGs, creative solutions might not be applicable or feasible, and as a consequence, in order to enforce the detainee's right to humane treatment and human dignity, detention operations must cease, and all those in the power of said NSAGs should be freed.

Similarly, the capacity to hold detainees is predicated on the ability to comply with minimum detention standards. Again, the disparity between states and NSAGs provides a considerable challenge, sometimes even to the most basic requirements. Tempting as may be to declare NSAGs incapable of providing adequate detention conditions, the result of such stringent policy could be an incentive to commit summary executions, as there is no incentive to detain, and executing prisoners is much more efficient, resource-wise. For this reason, taking these obligations under a sliding-scale context can provide, once more, a way out of this conundrum. Similarly to the issue of safeguards, detention conditions can be complied with if considering their core obligation.

After analysing the process of detaining an individual, Chapter 6 will address the next logical step in many situations: judicial guarantees in prosecution. The partial overlap between the two areas has been brought up a few times throughout this thesis, and especially in this chapter. It is true that some safeguard elements are judicial in nature, but, even in reviewing a security detention, the stakes are not as high as the ones faced by a prisoner being criminally prosecuted. Consequently, the judicial guarantees in these situations must be significantly stricter, as to preserve not only one's freedom, but many times their life.

# Chapter 6 – Judicial Guarantees in Prosecution

In the previous chapters we have established the legal basis for detention, the procedural safeguards that must be respected in such conditions, as well as the legal basis for prosecution and review of the grounds for security detention, that must be observed by Non-state armed groups (NSAGs). Consequently, the last chapter of this thesis will address what is also the last step in the logical progression of a detention, adjudication before a court. It is important to highlight that, regardless of the nature of the detention, be it in the context of criminal prosecution, disciplinary procedure, or security detention, these judicial guarantees are always applicable, as they are essential for successfully challenging the sanction to be imposed.[1]

The chapter will be divided in three parts. Firstly, the matter will be prefaced by the crucial to determination of which regime(s) are applicable in the different categories of judicial proceedings covered by this thesis, *i.e.*, disciplinary trials, security detentions, and criminal prosecutions. The discussion will also cover the issue of standards' thresholds that must be observed in order to preserve these guarantees' core obligations. Since a disciplinary judgment for persistent tardiness and a criminal prosecution for alleged war crimes carry wildly different consequences, so the requirements of fair trial guarantees must vary in their strictness.

Very importantly, the possibility of derogation of fair trial guarantees will be discussed in sequence. This issue is particularly important, considering the exceptional circumstances involving a Non-International Armed Conflict (NIAC), and the perennial limitations surrounding the administration of justice by NSAGs. An

[1] Louise Doswald-Beck, *Human rights in times of conflict and terrorism* (Oxford University Press 2012), 270.

analysis of the nature of these provisions and the possibility of their derogation by states will be undertaken, considering the available jurisprudence.

Finally, the indispensable judicial guarantees themselves will be discussed. As it has been proposed from the second chapter on, the approach adopted to address detentions and prosecutions by states cannot normally be transposed to the reality of NSAGs. Setting unattainable standards invariably defeats the purpose of these provisions, and as a consequence encourage the violation of the very rights intended to be protected. With that in mind, this chapter takes into account the necessary adaptations and creative solutions that must be set in this particular context, without losing the sight of the core obligations these guarantees aim to attain.

With this final chapter, it will be possible to regard the execution of these operations, that are fundamental elements of warfighting, by NSAGs under a different light. By adopting a gradual and contextual approach, the same obligations that are expected from states can also be reasonably required of any NSAG, be it a *'a small mobile unit* [dragging] *handcuffed prisoners through the jungle'*[2] to quasi-state-like entities, possessing resources and personnel comparable to a small nation.

## 1. The interplay between International Human Rights Law and International Humanitarian Law of NIAC in the framework of criminal prosecutions

Following the logic that has permeated this thesis, the question of which applicable legal regime regulates prosecutions carried out by NSAGs is a considerable problem when establishing the indispensable judicial guarantees in these settings. While the evolution of these protective norms was irregular, to say the least, a significant change can be observed. Starting from the broad statement found in Common

[2] James Bond, 'Application of the Law of War to Internal Conflicts' (1973) 48(2) *Georgia Journal of International and Comparative Law*, 371.

Article 3 (CA3), prohibiting *'the passing of sentences* […] *without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples'*,[3] to the more developed article 6 of Additional Protocol II (APII),[4] it is clear that the approach taken in the determination of fair trial guarantees has shifted considerably. The main factor guiding this departure is the appearance and subsequent development of IHRL.[5] A clear parallel can be traced between the norms contained in articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR),[6] which is closely mirrored by the aforementioned APII article.

The definition of the applicable law must be approached from two distinct situations. Firstly, in a scenario in which a NSAG that has a substantial level of organisation, having consistently displaced its parent state's territorial control, becomes a *de facto* state in its stead. The second possibility, which poses a reasonably more complex setting, regards a situation in which this organisation has not acquired international legal personality (ILP) yet. While the rules are more or less uniform in relation to the former case, in the latter there is a whole spectrum of situations, which require a contextual appreciation. In this grey zone, a gradated approach is necessary, considering not only the group's organisation, but also the resources – both human and material – available, as well as the type of prosecution being conducted and its potential consequences.

[3] Common Article 3(d) to the Geneva Conventions of 1949.
[4] Article 6, Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II). Geneva, 8 June 1977.
[5] Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflicts* (Oxford University Press 2016), 152-153; and René Provost, *Rebel Courts: The administration of Justice by Armed Insurgents* (Oxford University Press 2021), 289.
[6] International Covenant on Civil and Political Rights (ICCPR). 16 December 1966.

Addressing the first scenario, in which the NSAG is in exclusive possession of a territory, displacing its parent state's authority completely, the establishment of the group's fair trial obligations is relatively straightforward. Following the *de facto* control theory, a NSAG in such condition is obliged to perform state-like functions in order to maintain the order and safety of the population living in under its control,[7] and acquiring a limited form of ILP, allowing it to self-regulate in the areas in which it performs said duties.[8] In the context at hand, this would mean the necessary measures to maintain public order, including establishing judicial bodies. Much like a *de iure* state, the NSAG in this situation would be allowed to perform all the necessary legislative functions to establish not only courts, but also procedural codes.

On the other hand, in cases outside this situation, meaning almost the absolute majority, the approach towards judicial guarantees should be highly contextual. As it was previously established, NSAGs operating under the threshold of ILP are bound by their parent states' legislation via domestic prescriptive jurisdiction. Taking this into account, the matter of the applicable legislation regulating judicial guarantees ceases to be a problem. Since the legislation applicable by states regulating criminal prosecutions unrelated NIACs, the review of security detentions, as well as disciplinary norms is based on an IHRL framework, the inescapable conclusion is that the same framework should be equally extended to the same actions when performed by NSAGs. It is important to note that, even though the applicability of an

[7] Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55(2) *International and Comparative Law Quarterly*, 379; Jann Kleffner, 'The applicability of international humanitarian law to organized armed groups' (2011) 93(882) *International Review of the Red Cross*, 452; and Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016), 121-122.
[8] Daragh Murray, *Human Rights Obligations… ibid.*; and Gus Waschefort, 'The pseudo legal personality of non-state armed groups in international law' (2011) 36 *South African Yearbook of International Law*, 232-233.

international norm is dependent on its reception into a municipal order, this relationship between the international and domestic legal systems should not be problematic, regardless of the approach adopted by the state. In both monist and dualist systems, international law forms a part of the state's domestic legal order, the only exception being in cases where a state adopts a monist approach with preponderance of domestic law, in which case this whole discussion would be moot.[9]

Having established that the judicial guarantees applicable to the review of security detentions, disciplinary prosecutions, as well as criminal prosecutions unrelated to the armed conflict, the only form of prosecution still in need of analysis are criminal prosecutions related to the NIAC.

Initially, it is necessary to establish if the obligation to prosecute war crimes and violations of IHL are present in both IHL and IHRL. Under IHL, there is plenty of evidence supporting the idea that this obligation is of customary nature, particularly in relation to IHL of International Armed Conflict (IAC), being part of numerous military manuals, as well as state practice.[10] The acceptance of the customary status of this obligation under the IHL of NIAC is a bit less clear. Despite the number of amnesties granted by states at the end of NIACs, plenty of sufficient *praxis* and *opinio iuris* can be verified, including by some of these states' courts, by striking down the aforementioned amnesties.[11] Under an IHRL perspective, several UN bodies, including the Human Rights Council and the Committee Against Torture, have urged states as well as NSAGs to investigate and prosecute these illegal

[9] James Crawford, *Brownlie's Principles of Public International Law* (9th ed Oxford University Press 2019) 45-102.
[10] International Committee of the Red Cross, Customary IHL Database: Practice relating to Rule 158. Prosecution of War Crimes (*British Red Cross/International Committee of the Red Cross*), <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule158#Fn_103666CB_00005> accessed 20 March 2023.
[11] *ibid.*

acts.[12] Taking into account that such obligations are present in these systems, it is only logical to conclude that the duty to comply with fair trial guarantees is also customary under these legal regimes.[13]

Likewise, there are plenty of positive norms regulating these guarantees under IHL and IHRL. This regulation can be found in CA3 and article 6 of APII, and in numerous IHRL instruments, but mainly in ICCPR.[14] As mentioned above, the evolution of these norms in the context of NIACs started from the open provision of CA3 to a more fleshed-out catalogue of rules, heavily inspired by the ICCPR. This inspiration gave rise to a framework, applicable both in IAC and NIAC, that is very similar in construction to its IHRL counterpart, as can be verified by a cursory comparison between article 6 of APII and articles 14 and 15 of ICCPR. Nevertheless, while in principle these two systems appear to be similar in content, there is a considerable disparity between them, with the IHRL regime possessing a sensible development in relation to the one of IHL of NIAC. Since there is a much greater institutionalisation in the enforcement of these obligations, we consequently have a much more developed jurisprudence, filling the gaps in the interpretation of these norms. This guarantees a greater legal certainty and additional protection to those

[12] For instance, see Human Rights Council, *'The human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups*', A/HRC/RES/S-22/1, 3 September 2014, pars. 1-3; Human Rights Council, *'Technical assistance and capacity-building in strengthening human rights in Iraq in the light of the abuses committed by DAESH and associated terrorist groups'*, A/HRC/RES/28/32, 8 April 2015, pars. 1-2; and Committee Against Torture, *'Concluding observations on the initial report of Iraq'*, CAT/C/IRQ/CO/1, 7 September 2015, pars. 11-12. For doctrinal support see René Provost, *Rebel Courts: the administration… supra* at 5, 293-297; and Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (Oxford University Press 2018), 164-169.

[13] René Provost, *Rebel Courts: the administration… supra* at 5, 297; and International Committee of the Red Cross, Customary IHL Database: Practice relating to Rule 100. Fair Trial Guarantees (*British Red Cross/International Committee of the Red Cross*), <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule100> accessed 20 March 2023.

[14] Including Article 14(1), ICCPR; article 40(2)(b)(iii), Convention on the Rights of the Child. 2 September 1990; article 6(1), European Convention on Human Rights (ECHR). 4 November 1950; article 8(1), American Convention on Human Rights (ACHR). 22 November 1969; and article 7, African Charter on Humans and Peoples' Rights (ACHPR). 27 June 1981.

being prosecuted. Not only that, but these additional venues of enforcement also mean that more the supervisory mechanisms are available under IHRL.[15]

It is then evident that there is a significant gap in protection between two groups of people. On one side, those prosecuted for criminal offences unrelated to the armed conflict, those being judged by disciplinary misconducts, or those having their security detention reviewed benefit from the broader, more protective fair trial framework in IHRL. On the other, those being prosecuted by criminal offences bearing a nexus with the armed conflict find themselves under the material jurisdiction of courts operating under the guarantees found in IHL of NIAC, which are less protective.

### *1.A. The principle of* **Untermaßverbot** *as a tool to enhance protection*

While not being unconstitutional, the difference in protection between these individuals under domestic law seems unfair, particularly considering that the different legal regimes in question intend to achieve the same outcome and share many similarities. A possible workaround, which allows for the much-needed equivalence across the different types of prosecution, is the application of the constitutional law principle of Untermaßverbot.

This principle, stemming from German constitutional law and spreading throughout countries of civil law tradition – such as Brazil, Portugal, Colombia, Spain, and Italy – establishes a legal imperative in which the protection of an individual's fundamental rights must be maximised within a legal system.[16] Based on the umbrella principle of

[15] René Provost, *Rebel Courts: the administration… supra* at 5, 293-294.
[16] Carl-Wilhelm Canaris, 'Grundrechte und Privatrecht' (1984) 184(3) *Archiv für die civilistische Praxis*, 225-229; and Robert Alexy *et. al.,* 'Verfassungsrecht und einfaches Recht - Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit' (2001) 61 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 172-173, 216-219. This principle was first used by Carl-Wilhelm Canaris in the abovementioned article, and was further developed in the German scholarship by

proportionality, it is one of two mechanisms that are indispensable to criminal guaranteeism, *i.e.*, Übermaßverbot (or prohibition of excess), and Untermaßverbot (or the prohibition of insufficient protection). Both principles are instruments to guarantee a proportional application of laws, in order to preserve human guarantees, being Übermaßverbot its positive aspect, while Untermaßverbot its negative dimension.[17] Focussing on Untermaßverbot, this mechanism of legal interpretation intends to fill any gap in a legal system, where a state's legislation, while aiming at protecting a fundamental guarantee. It is applicable when disproportionate levels of protection are identified, being caused by legislative omission. In such scenarios, in order to maximise the protection, taking into account the teleology of the norms involved, the application and/or interpretation of the normative system must be extended as to fill this gap. While these legal arrangements are necessary, taking

works such as Carl-Wilhelm Canaris, 'Grundrechtswirkungen und Verhältnismäßigkeitsprinzip in der richterlichen Anwendung und Fortbildung des Privatrechts' *in* Hans Hans Christoph Grigoleit and Jörg Neuner (eds), *Claus-Wilhelm Canaris, Gesammelte Schriften* (De Gruyter 2012); Martin Borowski, *Grundrechte als Prinzipien* (Nomos 2018); Johannes Dietlein, 'Das Untermaßverbot: Bestandaufnahme und Entwicklungschancen einer neuen Rechtsfigur' (1995) 9 *Zeitschrift für Gesetzgebung*; Karl-Eberhard Hain, 'Der Gesetzgeber in der Klemme zwischen Übermaß und Untermaßverbot' (1993) 108 *Deutsches Verwaltungsblatt*; and Karl-Eberhard Hain, 'Das Untermaßverbot in der Kontroverse: eine Antwort auf Dietlein' (1996) 11 *Zeitschrift für Gesetzgebung*. For an analysis of this principle in different settings, particularly from a third world perspective, which I consider more appropriate considering the issues discussed in this thesis, see Carlos Bernal Pulido, *El principio de proporcionalidad y los derechos fundamentales* (4th ed Universidad Externado de Colombia 2014); José Joaquim Gomes Canotilho, *Direito constitucional e teoria da constituição* (7th ed Almedina 2003); Ingo Wolfgang Sarlet, 'Constituição, proporcionalidade e Direitos Fundamentais: o Direito Penal entre proibição de excesso e insuficiência' (2006) 7(1) *Revista Opinião Jurídica*; Lenio Luiz Streck, 'Bem jurídico e constituição: os limites da liberdade de conformação legislativa e a aplicação (corretiva) da nulidade parcial sem redução de texto (Teilnichtigerklärung ohne Normtextreduzierung) à lei dos juizados especiais' (2007) 41(48) *Revista do Instituto de Pesquisas e Estudos*; and Lenio Luiz Streck 'Bem Jurídico e Constituição: da proibição de excesso (Übermaßverbot) à proibição de proteção deficiente (Untermaßverbot) ou de como não há blindagem contra normas penais inconstitucionais' (2004) 80 *Boletim da Faculdade de Direito da Universidade de Coimbra*.

[17] Robert Alexy *et. al.,* 'Verfassungsrecht und einfaches Recht ...' *ibid.,* 216-219 ; Carlos Bernal Pulido, *El principio de proporcionalidad... ibid.*, 781-785; and Lenio Luiz Streck 'Bem Jurídico e Constituição...' *ibid.,* 314-316.

into account the idea of proportionality, it is submitted that this objective must be achieved making the least invasive intervention.[18]

In order to consider whether this intervention is adequate and legitimate in light of the legal system, a test consisting of three elements – a) suitability, b) necessity, and c) proportionality *strictu sensu* – must be conducted. Firstly, it must be determined whether the norm(s) or their absence is suitable to protect the fundamental right, in the sense that it favours the realisation of the legislative end to which it was proposed. Secondly, this norm(s) or abstention, being considered unsuitable, can be complemented by an alternative set of norms which favours more intensely the realisation of the right being violated, as intended by the legislator. Finally, the means by which the intended objective (*i.e.*, the protection of a right) can be achieved must be proportionate, or reasonable, considering that an adequate measure might cause a disproportionate effect.[19] It is important to highlight that, for part of the scholarship, this last criterion is more theoretical than practical, since most of the situations of incompatibility happen in the analysis of the necessity test rather than in the establishment of a proportional measure.[20]

Considering the principle of Untermaßverbot, it becomes clear that the applicable legislation to those individuals being prosecuted by crimes related to the armed conflict is insufficient. While in all other situations, an individual would be prosecuted under the framework of IHRL, the group above would be submitted to CA3 and APII, which is a less protective set of norms, despite being structurally similar. By conducting the legitimacy test above, it is possible to verify that, IHL of NIAC as it

[18] Carl-Wilhelm Canaris, *Grundrechte und Privatrecht… supra* at 16, 227-228.
[19] Carlos Bernal Pulido, *El principio de proporcionalidad..., supra* at 16, 1031-1033; and Ingo Wolfgang Sarlet, 'Constituição, proporcionalidade e Direitos...' *supra* at 16, 331, 336-338.
[20] Ingo Wolfgang Sarlet, 'Constituição, proporcionalidade e Direitos...' *ibid.*, 338.

stands, provides a lower standard of protection of the principle of fair trial to than it can be achieved by the use of IHRL. In this sense, the norms cannot be considered to maximise protection, especially taking into account that, as it was explicitly stated during the *travaux préparatoires* to the Additional Protocols to the Geneva Conventions, the rules in article 6 of APII were intended to mirror articles 14 and 15 of ICCPR, in some situations, even adopting the Covenant's wording verbatim.[21] In relation to the second element, necessity, the fact that individuals being criminally prosecuted are denied important guarantees, such as the right to have a public trial, which can be found in article 14(1) of ICCPR, and to appeal a decision, which can be found in article 14(5) of ICCPR, it is evident that addressing the insufficient protection of the right to fair trial is necessary. Not only that, but, as mentioned above, applying IHRL to these situations also provides tangential benefits, such as the resort to denser jurisprudence and more oversight mechanisms. Lastly, it remains the analysis of the criterion of proportionality. Providing individuals being tried by the same courts *ratione materiae* with the same judicial guarantees, by extending the application of IHRL norms to those individuals also being tried in criminal courts, but for violations of IHL and war crimes, is without a doubt a proportionate measure.

Once it is verified that a situation of inefficient protection exists in relation to that group of individuals, and that the application of IHRL, particularly the provisions found in ICCPR, all prosecutions being conducted in the context of a NIAC are harmonised under IHRL. Consequently, the adjudicating authority must provide the

[21] Michael Bothe, Karl Joseph Partsch and Waldermar A. Solf, *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd ed Martinus Nijhoff 2013), 729-730, 745; Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Kluwer 1987), 1365-1366, 1396-1397; and René Provost, *Rebel Courts: the administration… supra* at 5, 289.

same standards of judicial guarantees to all individuals, and, collaterally, providing simpler, yet more protective, standards to NSAGs, as it would require adjustments to a single area of Law. Nevertheless, despite IHRL being the applicable legislation, the role of IHL of NIAC cannot be neglected, as it still provides important interpretive guidance to complement the IHRL rules.

### *1.B. Applying a contextual approach to judicial guarantees*

Despite the equality of judicial guarantees being a crucial element of fair trial, the need to be implement these same guarantees in the interest of justice dictates that different situations require different thresholds of compliance. This is, in fact, already accepted in relation to states.[22] Different standards of judicial guarantees are generally accepted in both the Global North's highly developed countries, and Global South states, with the exception being those countries sometimes called derogatively 'failed states.' This flexibility is accepted in domestic jurisdictions for the implementation of fair trial rights, by allowing different procedural arrangements, as can be verified, for instance in the concept of margin of appreciation, found in the context of the European Court of Human Rights (ECoHR).[23]

Applying an already acceptable practice to NSAGs does not seem like a far-fetched interpretation. Provost reminds us in his latest book of an argument which was made in the direction of a contextual application of fair trial standards by NSAGs, made in the context of the Salvadorean civil war.[24] In its famous report on the application of justice by the FMLN, America's Watch stated, while denying the group's claim that

[22] René Provost, *Rebel Courts: the administration… supra* at 5, 298-308.
[23] Mirjan Damaška, 'Reflections on Fairness in International Criminal Justice' (2012) 10(3) *Journal of International Criminal Justice*, 614-616.
[24] René Provost, *Rebel Courts: the administration… supra* at 5, 307.

judicial guarantees should be adapted to the conditions and capacity of the specific party to the conflict, that

> *'*[…] *the term "regularly constituted court" used in Common Article 3(1)(d) was replaced in Protocol II, Article 6, para. 2, by a more appropriate requirement: "a court offering the essential guarantees of independence and impartiality." This formulation envisions the coexistence of two sets of national legislation -- that of the State and the other of the rebels'*[25]

The approach suggested by America's Watch is a good illustration of the balance that should be sought. On one hand, adapting judicial guarantees to the capacity of the party, irrespective of its actual ability to uphold a minimum of fairness, is as good as not having standards at all. On the other hand, applying a rigid set of rules can be a threshold too high for NSAGs to comply with, which, once again, is as useful as not imposing these standards from the start.

This analysis should not only be made in relation to the overall capacity of the adjudicating authority, but also in relation to the prospective consequences of a conviction. The adaptation of judicial guarantees to different procedures must be balanced by an exercise of proportionality. An understanding that situations such as an armed conflict can affect the ability to comply with these guarantees is generally accepted within the boundaries of reasonableness. For instance, in its General Comment 29, the Human Rights Committee (HRC) has recognised that

> *'[e]ven if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2,*

[25] Americas Watch, *Violation of Fair Trial Guarantees by the FMLN's Ad Hoc Courts* (Americas Watch 1990), 12-13.

> *paragraph 3, of the Covenant* [on the obligation to provide effective remedies] *to provide a remedy that is effective.'*[26]

A similar position is adopted by the Inter-American Court of Human Rights (IACHR),[27] as well as by the ECoHR, in the abovementioned context of margin of appreciation. In this sense, the different standards required of a disciplinary hearing and a prosecution for an alleged war crime are vastly different. A disciplinary hearing might be conducted by members of the defendant's same armed group, since the range of sanctions may include corrective measures, financial penalties, or disciplinary measures, being generally less grievous than a criminal prosecution.[28] The same flexibility should not be allowed when prosecuting an individual for the commission of war crimes, since the potential consequence may include death. These nuances will be analysed below in section 3.

## 2. Derogation of fair trial guarantees

Similarly to the discussion above on the application of a contextual approach to judicial guarantees, another issue that has the potential to lead to substantive violations of fair trial guarantees is the possibility of derogating provisions that determine judicial guarantees.

An argument in favour of the application of IHL of NIAC to judicial guarantees in prosecutions by NSAGs is the fact that, contrary to IHRL, these provisions are not submitted to a derogation regime.[29] At first glance, this reasoning does bear some relevance, as this regime was deigned to be applied in situations of emergency, such

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[26] United Nations Human Rights Committee, *General Comment No. 29: Article 4: Derogations during a State of Emergency*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, par.14.
[27] Gabriela Rodríguez Huerta, 'Artículo 27. Suspensión de Garantias' *in* Christian Steiner and Marie-Christine Fuchs (eds), *Comentario Convención Americana Sobre Derechos Humanos* (2d ed Konrad Adenauer Stiftung 2019), 843.
[28] Ben Saul, 'Enhancing Civilian Protection by Engaging Non-State Armed Groups under International Humanitarian Law' (2017) 22(1) *Journal of Conflict and Security Law,* p. 56.
[29] Ezequiel Heffes, *Detention by Non-State Armed Groups under International Law* (Cambridge University Press 2022), 123.

as NIACs. If a state involved in a NIAC derogates from essential judicial guarantees, such as the presumption of innocence, it will not only be conducting unfair trials, but also encouraging NSAGs to commit the same kind of injustice, adding another problem to an already precarious situation. Nevertheless, a more detailed examination of the regime of derogations in IHRL vis a vis the indispensable fair trial guarantees provides a clear solution.

Initially, it must be recognised that some fair trial guarantees are expressly non-derogable. Under article 4(2) of ICCPR, we find that the right to be free from the retroactive application of penal laws cannot be suspended under any circumstances. This position is reiterated by the European Convention on Human Rights (ECHR) in its article 7. The approach adopted by the American Convention on Human Rights (ACHR) is more protective, determining that *'[t]he foregoing provision* [on the suspension of guarantees] *does not authorise any suspension of the following articles* […] *or of the judicial guarantees essential for the protection of such rights.'*[30] The mentioned articles cover the protection of the right to juridical personality, life, humane treatment, freedom from slavery, freedom of conscience and religion, right to the family, right to a name, rights of the child, right to a nationality, right to participate in the government, and, most importantly to this discussion, freedom from *ex post facto* laws.

The approach adopted by the ACHR, is of particular importance because it recognises that while judicial guarantees may be affected during a NIAC, this does not mean that they lose their importance, in protecting other, non-derogable, rights. This position is further developed by the IACHR. In a couple of advisory decisions

[30] Article 27(2), ACHR.

issued less than a year apart, the court sedimented its understanding that, while the principle of legality must never be derogated, whenever other fundamental guarantees are suspended, the restraints applicable to public authorities is applied in a different manner as it would be under normal circumstances.[31] These restraints, although, relaxed to adapt to exceptional situations, must not be supressed or rendered ineffective, and neither should be the means by which an individual would seek the protection of their rights.[32] The Court concludes by determining that, as a consequence of the need to protect non-derogable rights, the suspension or the ineffectiveness of the judicial guarantees necessary to protect them is, in itself, a violation of the ACHR.[33]

This approach was adopted by the HRC in the abovementioned General Comment 29, which provides the basis not only to the establishment of proportionality between the standards of application of judicial guarantees. General Comment 29 is also useful in establishing that, the judicial guarantees put in place in order to protect non-derogable rights cannot be derogated, otherwise this would be a circumvention of the protection on non-derogable rights themselves.[34]

The dominant jurisprudential view on the derogation of rights would then allow for all the rights not explicitly mentioned as non-derogable to be suspended. Nevertheless, these suspensions should never compromise the protection of non-derogable rights.

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[31] Inter-American Court of Human Rights, *Advisory opinion on Habeas Corpus in emergency situations (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, OC-8/87, 30 January 1987, par. 24; and Inter-American Court of Human Rights, *Advisory Opinion on Judicial Guarantees in states of emergency (arts 27(2), 25 and 8 American Convention on Human Rights)*, OC-9/87, 6 October 1987, par. 25. See also, Inter-American Commission of Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, 22 October 2002, pars. 94-96.

[32] Inter-American Court of Human Rights, *'Advisory Opinion on Judicial Guarantees…'*, *ibid.,* pars. 24-25.

[33] *Ibid*., pars. 26, 28-30; and Inter-American Commission of Human Rights, *Report on Terrorism and Human Rights, supra* at 31, pars. 95-96.

[34] Inter-American Court of Human Rights, *Advisory opinion on Habeas Corpus, supra* at 31, pars. 14-15.

In the present situation, this would mean that, while on a first look the right to be presumed innocent could be derogated, this would not stand to a closer scrutiny in cases which involved, for instance, the death penalty. Despite not preventing the suspension of every judicial guarantee, this decision would be sufficient to prevent the direst consequences of a violation of fair trial, for example, the right to not be compelled to admit one's guilt would be protected under the non-derogable right of humane treatment, as a forced confession is invariably acquired by means of torture, inhuman or degrading treatment. In relation to the remaining judicial guarantees, although not expressly protected, it is a general understanding that these limiting measures should be applied observing the principle of proportionality.[35] Therefore, while judicial guarantees could be derogated, this should only be exercised with the least intervention necessary, and at the same time, guaranteeing a reasonable application of judicial guarantees necessary to effect a fair trial.

### 3. Indispensable guarantees

The list of guarantees identified in article 14 and 15 of ICCPR, was a development over the general rights proposed in articles 10 and 11 of the Universal Declaration of Human Rights. This final list of guarantees was largely reproduced in subsequent instruments, such as the ECHR, the ACHR, and the African Commission's Principles and Guidelines on the Right to a Fair Trial,[36] and it can be safely established as the standard list of indispensable guarantees in IHRL.[37] Not only that, but, as pointed out by Nowak, *'inherent in these procedural guarantees is a far-reaching potential for a*

[35] As can be seen in Mirjan Damaška, 'Reflections on Fairness…', *supra* at 23; Gabriela Rodríguez Huerta, 'Artículo 27. Suspensión de Garantias…' *supra* at 27, 843-844; René Provost, *Rebel Courts: the administration… supra* at 5, 300; and Inter-American Court of Human Rights, *Galindo Cardenas y otros v. Perú*, Sentencia, 2 de Octubre de 2015, pars. 198-199.
[36] African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, DOC/OS(XXX)247, 2003.
[37] Manfred Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (2nd rev ed N.P. Engel 2005), 305-307.

*step-by-step adapatation of the differing national legal systems to a common minimum standard of the "rule of law" in civil and criminal trials.'*[38] This position, reiterates the position adopted by the HRC in its General Comment 32.[39] This point, although state-centric, does reinforce the idea that these obligations can, and should, be extended to situations including NSAGs.

In analysing these guarantees, it is important to highlight that, due to the nature and brevity of the present thesis, a couple of elements will not be addressed. The application of article 14(4) of ICCPR, regarding judicial guarantees specific to juvenile persons, to NSAGs is a particularly relevant topic. Considering the estimate that tens of thousands of children are currently taking part in armed conflicts around the world,[40] this topic deserves much more attention than it can be dispensed in the current document, and as such it will not be addressed.[41] In the same manner, the provision in article 14(6) of the same treaty, on reparations for miscarriage of justice, is beyond the scope of this research, and it will also not be discussed.

### *3.A. Equality before the courts*

The right of equality between the courts, present in article 14(1) of ICCPR, as well as the ACHR, called 'right to a hearing',[42] although not expressly non-derogable, is a

[38] *ibid.,* 307. Ezequiel Heffes seems to agree with this position in his book *Detention by Non-State… supra* at 29, 80.
[39] United Nations Human Rights Committee, *General Comment No. 32 (Article 14) on the Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32, 23 August 2007, par. 4.
[40] War Child, 'Children associated with armed forces and groups' (*War Child*, n/d), <https://www.warchild.org.uk/our-work/what-we-do/innovative-programmes/reintegration/children-associated-armed-groups?gclid=Cj0KCQjwt_qgBhDFARIsABcDjOcbbYCe164VZkzabXCHZFeSBYcJd2ZT-PWO5xStEvgkJQEV_eRJMBwaAq2ZEALw_wcB> accessed 25 March 2023.
[41] A good step in this direction can be seen in Sandesh Sivakumaran, 'Armed Conflict-Related Detention of Particularly Vulnerable Persons: Challenges and Possibilities' (2018) 94(39) *International Law Studies*. Although addressing the challenges involved in detention, many aspects can be replicated or used as a basis for the development of the subject.
[42] Juana María Ibañez Rivas, 'Artículo 8. Garantías judiciales' *in* Christian Steiner and Marie-Christine Fuchs (eds), *Comentario Convención Americana Sobre Derechos Humanos* (2d ed Konrad

crucial element of the right to fair trial. Not only this guarantee is applicable at all times, in both civil and criminal proceedings,[43] but it is also considered a guarantee that informs all the subsequent ones in article 14. Considering the position adopted by the IACHR and the HRC in relation to the derogability of fundamental rights, it rests clear that the right to equality before courts is a condition *sine qua non* to the enforcement of non-derogable rights. Consequently, it is unlikely to imagine a situation in which this guarantee could be derogated. Nevertheless, this principle can be adapted to fulfil the available resources, with these adjustments being limited by a proportionality assessment.

The elements of the right to equality before courts includes the right to '[…] *a fair and public hearing by a competent, independent and impartial tribunal established by law.'* As the right to a public hearing will be addressed on its own, the present discussion will address the remaining elements. The requirement of competence, as already analysed at length in Chapter 4, is an essential element to uphold a minimum of fairness during the proceedings, and it should be interpreted more strictly as the complexity of the situation increases and the potential consequences of become graver. Reusing the example provided previously, the trial of an individual for an alleged war crime would not permit anything less than an individual fully trained and experienced in Law, with a strong preference for former judges.

In relation to the requirements of independence and impartiality, these specific judicial elements are closely related to the discussion of independence and impartiality in the establishment of courts, which were also addressed in Chapter 4.

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Adenauer Stiftung 2019), 13-15. This concept was also included throughout the African Commission on Human and Peoples' Rights, *Principles and Guidelines…*, *supra* at 36.

[43] Manfred Nowak, *U.N. Covenant on Civil… supra* at 37*,* 307; and Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights – Cases, Materials, and Commentary* (3rd ed Oxford University Press 2013), 434, [14.06].

As explained by the HRC in its General Comment 32, the requirement of independence is composed of two aspects including,

> '[…] *the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.'*[44]

Differently from the substantive requirements for the establishment of courts, which describes independence from a macro level perspective of Justice, the subjective element of independence aims to protect the adjudicator from the undue influence of external actors. While this commentary was clearly established with states in mind, as the capacity to establish a career plan including safeguards such as tenure, immovability, and protection from reprisals require a high level of resources and specialised personnel. It is true that, in some extreme cases, highly developed NSAGs might be able to establish safeguards for judges rivalling those of states, but it is not that uncommon that some a varying degree of those guarantees are available in NSAG-controlled territory. From the already-tired example of the LTTE courts, to more recently, the courts of the Republics of Donetsk and Luhansk, as well as the several armed groups in Syria, there have been countless attempts to guarantee the impartiality of adjudicators, with varying degrees of success.[45] If taken

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[44] United Nations Human Rights Committee, *General Comment No. 32 (Article 14)…, supra* at 39, par. 19.

[45] See for example, Vladislav Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' (2017) 28(2) *The European Journal of International Law*, 556; Yaël Ronen, 'Human Rights Obligations of Territorial Non-State Actors' (2013) 46 *Cornell International Law Journal*, 46-47; Zachariah Cherian Mampilly, *Rebel Rulers: Insurgent Governance and Civilian Life during War* (Cornell University Press 2011), 116-119; Daragh Murray, *Human Rights Obligations… supra* at 7, 177-179, 206-207; Geneva Call, Positive Obligations of Armed Non-State Actors: Legal and Policy Issues: Report from the 2015 Garance Talks (2016) 1 *The Garance Talk Series*, 15; René Provost, *Rebel Courts: the administration… supra* at 5; Regine Schwab, 'Insurgent Courts in civil wars: the three pathways of (trans)formation in today's Syria (2012-2017)' (2018) 29(4) *Small Arms & Insurgency*; More specifically, see Free Syrian Army, *Southern Front – Judicial Structure according to*

into account that the idea of applying a gradated approach is to assure that the core of the obligations – in this case preventing judges from being influenced by external actors – while applying a level of discretion to these requirements. Examples such as LTTE, Rojava, and Somaliland courts have complied with these requirements in a manner no more different that some recognised states.[46]

The impartiality aspect can be more easily achieved. Once again, General Comment 32 provides us with important guidance. In the Comment, the HRC explains that the requirement of impartiality must be examined under its subjective and objective prisms. Subjective impartiality requires that the adjudicator does not allow their personal bias to influence their judgement.[47] While this, as the name implies, is a subjective criterion, by not trying to actively favour a party to the proceedings, the adjudicator should perform their duties in a reasonably impartial way.[48] On the other hand, impartiality in its objective form, means that it is not enough for the judge to be impartial, but they must also appear to be impartial to an external party.[49] In this sense, by merely abstaining from making statements, or behaving with explicit sympathy or animosity towards a party to the proceedings, the judge could appear as an impartial adjudicator in most situations.

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*the Unified Arab Law* (2017 Geveva Call) <http://theirwords.org/media/transfer/doc/judicial_structure_according_to_the_unified_arab_law-e0ba4194e379447c7bc388f6eb8822bd.pdf> accessed 25 March 2023; Kurdish Institute Brussels, *Charter of the social contract in Rojava (Syria)* (n/d Kurdish Institute Brussels) <https://www.kurdishinstitute.be/en/charter-of-the-social-contract/> accessed 25 March 2023; and The Constitution of the Republic of Somaliland (2005 Somaliland Law) <http://www.somalilandlaw.com/somaliland_constitution.htm#Chpater4> accessed 25 March 2023, articles 97-98.

[46] René Provost, *Rebel Courts: the administration… supra* at 5, 89-94, 216-248, and 285-287; and Ezequiel Heffes, *Detention by Non-State… supra* at 29, 192-204.

[47] United Nations Human Rights Committee, *General Comment No. 32 (Article 14)…, supra* at 39, par. 21.

[48] Although falling beyond the scope of this thesis, it must be emphasised that the notion of subjective impartiality in itself is flawed. For a detailed analysis, see Brian Barry, *Justice as Impartiality* (Oxford University Press 2002), particularly Chapter 5 – 'Is impartial Justice a Fraud?' and 9 – 'Levels of Impartiality'. See also, Stefan Trechsel, 'Why must trials be fair?' (1997) 31 *Israel Law Review*.

[49] United Nations Human Rights Committee, *General Comment No. 32 (Article 14)…, supra* at 39, par. 21.

*3.A.1. Conversion of security detentions to preventive criminal detentions*

Having established the necessary elements for the guarantee of equality before courts, it is important to exemplify a few of the various contexts in which it might operate, as well as the different thresholds of application in each situation.

The importance of an assessment of the availability of resources versus the seriousness of the sanction has been stressed throughout the chapter. If on one hand it is true that the requirements imposed on NSAGs must not be unfeasible, it is even more important to make sure that the excessive flexibilization of the norms ends up legitimising violations of fair trial guarantees. In this sense, these two elements must be pondered in a case-by-case basis. The flexibility that is allowed both in domestic and international jurisdictions[50] provides a good paradigm for this evaluation. Having stated before that the use of military courts, particularly to judge civilians, falls short in most instances from the requirement of court independence, given that the adjudicators are members of the same branch of the government that performed the detention and prosecution of the accused person, there are a few caveats that must be recognised.

When considering criminal prosecutions, either related or not to the conflict, the highest standard of impartiality should be expected from the court, as, from all the types of prosecutions researched, these are the ones with the longest periods of deprivation of liberty, and in some instances resulting in potential arbitrary deprivation of life. Looking back at the non-derogable rights generally explicated in IHRL, we have that the right to life is to be protected at all times.[51] Assuming that a criminal prosecution can lead to an execution, there is no doubt that submitting a

[50] Mirjan Damaška, 'Reflections on Fairness…', *supra* at 23, 614-616.
[51] As can be seen, for example in article 6, ICCPR.

person to a military court falls significantly short from the requirement of independence.[52] This violation is particularly aggravated by the inexistence of the category of combatant, and the blurring of the line between a civilian and a fighter.[53] A good standard in these situations, at least in theory, would be the regimes adopted by the courts of the Free Syrian Army in Idlib, of Kurdistan in Rojava, as well as the LTTE judicial system.[54]

In less grievous situations, *i.e.*, in reviewing security detentions and in disciplinary hearings, this threshold could potentially be significantly lowered. Borrowing once again the idea of military courts, while not being able to uphold the highest levels of impartiality, they are still useful instruments. Considering the recurrence of disciplinary violations and the generally less rigorous nature of sanctions, the judicial guarantees in these situations require a lower level of legitimacy.[55]

A similar situation can be verified in relation to security detentions. While the initial review may be carried out in risky situations, such as a in active conflict zones, and consequently requiring a speedy resolution, it is reasonable to defend that this review could be carried out by the NSAG itself. Preventing these groups from dealing quickly, although provisionally, with detainees could risk inducing the commission of extrajudicial executions to preserve the fighter's own safety. This point of view is

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[52] See, for instance, Inter-American Court of Human Rights, *Castillo Petruzzi y otros vs. Perú*, judgement (merits, reparations and costs), 30 May 1999; *Casierra Quiñones y otros vs. Ecuador*, judgment (preliminary objections, merits and reparations), 11 May 2022; and *Cortez Espinoza vs. Ecuador*, judgement (preliminary objections, merits, reparations and costs), 18 October 2022. For a doctrinal explanation, see Juan Carlos Gutiérrez and Silvano Cantú, 'The restriction of military jurisdiction in international human rights protection systems' (2010) 7(13) *Sur – International Journal of Human Rights*.

[53] On the idea of revolving door and continuous combat functions, see Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (International Committee of the Red Cross 2009).

[54] René Provost, *Rebel Courts: the administration… supra* at 5, 186-188, and 361-362; Ezequiel Heffes, *Detention by Non-State… supra* at 29, 192-204.

[55] As defended by Ezequiel Heffes in 'Closing a Protection Gap in IHL: Disciplinary Detentions by Non-State Armed Groups in NIACs' (3 July 2018) *EJIL Talk!*.

supported by the very nature of the dispositions found in ICCPR. As mentioned by Nowak, a systemic interpretation of articles 9(3) and 14(1) of the Covenant, leads to the conclusion that, under certain circumstances, an administrative authority could fulfil the role of an independent and impartial court.[56] This understanding is reinforced by the *Vuolanne v. Finland* case at the HRC, when the Committee found that a military court could be considered 'a court of law' for the purposes of reviewing of a punishment.[57] This also seems to be the dominant view in the scholarship,[58] as well as some soft law instruments.[59] In opposition to the immediate need of an initial review for security detention, its periodic review can occur in a much less precarious situation, and consequently require a higher threshold of impartiality and independence, especially considering the generally accepted six month interval between reviews.[60]

An apparent gap in the scholarship can be identified in the situations in which a detainee's security detention is converted into a preventive criminal detention, before a periodic review. While a systematic interpretation of the framework that is being presented leads to a logical conclusion, this must be spelled out. In such cases, considering that the situation has become more grievous to the detainee, a new, and

[56] Manfred Nowak, *U.N. Covenant on Civil… supra* at 37, 307.
[57] Human Rights Committee, *Vuolanne v. Finland*, Communication No. 265/1987, 2 May 1989, CCPR /C/35/D/265/1987, pars. 9.3-9.6.
[58] As exemplified by René Provost, *Rebel Courts: the administration… supra* at 5, 200-202; Federica Favuzza, 'It was the Best of Times, It was the Worst of Times' *in* Paul De Hert, Stefaan Smis and Mathias Holvoet (eds), *Convergences and Divergences Between International Human Rights, International Humanitarian and International Criminal Law* (Intersentia 2018), 168; and Sarah Joseph and Melissa Castan, *The International Covenant… supra* at 43, 384.
[59] Principle 32, United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 9 December 1988; and The Copenhagen Process on the Handling of Detainees in International Military Operations: The Copenhagen Process: Principles and Guidelines, October 2012, Principle 12, and commentary 12.2.
[60] United Nations Human Rights Council, *General Comment no. 35, Article 9 (Liberty and security of person,* CCPR/C/GC/35, 16 December 2014, par. 12; Human Rights Committee, *A. v. Australia*, communication no. 560/1993, 3 April 1997, par. 9.2; and European Court of Human Rights, *Lebedev v. Russia*, application no. 4493/04, Judgement of 25 October 2007, pars. 78-79.

immediate review of the detention must be conducted, but this time relying on the much stricter requirements that are asked of a criminal proceeding. The role of the adjudicator that carried out the initial – or depending on the situation, the latest periodic – review would then be similar to that of a judge of liberties and detention (from the French figure of the '*Juge des libertés et de la détention*')[61]. Their role would then be to retroactively attest the physical and mental condition of the detainee, in order to make sure that no torture or other forms of coercion was employed, and that there are sufficient indicia to substantiate the immediate detention, before the grounds of the detention are further analysed by a judge.

### *3.B. Public trial*

Albeit being a fundamental element of a fair trial, the right to a public trial can be limited even during peacetime. According to article 14(1) of ICCPR, attendance to a trial may be limited, partially or in its entirety, for

> […] *reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children*.[62]

This disposition was reproduced, with a few differences, by the ECHR, article 6(1), and the ACHR, in its article 8(5). While not expressly stated, it is widely accepted that this right is implicitly protected by the African Charter on Human and Peoples' Rights (ACHPR).[63] Although these possible limitations can be easily imposed under

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[61] Paul Roubier, *Droits subjectifs et situations juridiques* (Dalloz 2005), 106-107; and Pauline Le Monnier de Gouville, 'Le juge des libertés et de la détention entre présent et avenir' (2011) 4 *Le Cahiers de la Justice*, 145-157.
[62] Article 14(1), ICCPR.
[63] African Commission on Human and Peoples' Rights, *Principles and Guidelines*…, *supra* at 36, 2.

many reasons, including the safety of the judges and court officials, lack of appropriate infrastructure, or geographical difficulties, the publicization of trials tends to be of great interest to NSAGs. There are a few interests at play when these organisations set up a system of courts. Firstly, by emulating a judicial system, and more broadly, establishing a system of governance, these entities demonstrate their capacity to become or succeed a government. Additionally, NSAGs courts are an important public relations tool. By punishing criminals, particularly among the own group, and solving general disputes, these groups try to show concern by the population in its territory and gain its sympathy. Finally, a more pragmatic reason is to enforce the preventative function of punishment, meaning that, by demonstrating that criminal acts are still punishable, they deter potential criminals, and even discourage any resistance to their rule.[64]

Although being allowed to be suspended, even without a derogation, the right to restrict public attendance to a trial is not legal *a priori.* While publicity might be precluded from a disciplinary trial, or even review of security detention, it becomes progressively hard to prevent public attendance as the case being judged is seen as relevant to a particular society. In these more notorious cases, the right to a public trial becomes an important element to uphold a court's objective impartiality, especially if concerning a crime committed by a member of said NSAG against the population.

[64] This *modus operandi* is reported generally in great depth in Ana Arjona, Nelson Kafir and Zachariah Mampilly (eds), *Rebel Governance in Civil War* (Cambridge University Press 2015), but particularly in the chapters by Zachariah Mampilly, 'Performing the Nation-State: Rebel Governance and Symbolic Processes', and Shane Joshua Barter, 'The Rebel State in Society: Governance and Accommodation in Aceh, Indonesia' *in* Ana Arjona, Nelson Kasfir, and Zachariah Mampilly (eds), *Rebel Governance in Civil War* (Cambridge University Press 2015); see also, Ana Arjona, *Rebelocracy: Social Order in the Colombian Civil War* (Cambridge University Press 2016); and Zachariah Cherlan Mampilly, *Rebel Rulers – Insurgent Governance… supra* at 45,116-118, 202.

Lastly, considering that public attendance to a trial can be suspended, it is understandable that in relation to criminal prosecutions, the decision must be publicised. This is a manner of retaining, even if partially, the legitimacy of a sentence, when the proceedings preceding it were restricted.[65] There is no established manner to make these decisions public, the requirement being that they are easily accessible. From execution orders affixed throughout Sloviansk by the Donetsk Peoples Republic[66] and in Raqqa by ISIS, [67] explaining the charges and details of the sentence to be carried out, to announcements spread via word of mouth, like some of FARC's front in the Amazon Forest,[68] each context may require a specific manner to disseminate the information. In order to communicate more easily with the population, some more sophisticated NSAGs have even set up social media accounts.[69]

### *3.C. Presumption of innocence*

The right to be presumed innocent is a foundational principle of modern Justice. As such, it is curious that such an important provision was not considered non-derogable by the major IHRL treaties. Nevertheless, this guarantee is considered a peremptory norm. This is the understanding of both the HRC[70] and the Inter-

[65] United Nations Human Rights Committee, *General Comment No. 32 (Article 14)…, supra* at 39, par. 29.
[66] Christopher Miller, 'Soot-Stained Documents Reveal Firing Squad Executions in Ukraine' (*Mashable* 10 July 2014) <https://mashable.com/archive/evidence-of-execution-trial-discovered-in-the-rubble-of-rebel-headquarters-in-ukraine> accessed 27 March 2023.
[67] Sarah Birke, 'How ISIS Rules' (*The New York Review* 5 February 2015) <https://www.nybooks.com/articles/2015/02/05/how-isis-rules/> accessed 27 March 2023.
[68] Nicolas Espinosa, 'La justicia guerrillera en Colombia. Elementos de análisis para los retos de la transición política en una zona de control insurgente (el case del piedemonte amazónico)' (2016) 37 *Estudios Latinoamericanos, Nueva Época*.
[69] Stein Tønnesson, Min Zaw Oo & Ne Lynn Aung, 'Pretending to be States: The Use of Facebook by Armed Groups in Myanmar' (2022) 52(2) *Journal of Contemporary Asia*; and Cyanne E. Loyle and Samuel E. Bestvater, '#rebel: Rebel communication strategies in the age of social media' (2019) 36(6) *Conflict Management and Peace Science*.
[70] United Nations Human Rights Committee, *General Comment No. 29…, supra* at 26, par. 11.

American Commission of Human Rights.[71] The latter, when discussing the meaning of the expression 'judicial guarantees essential for the protection of rights' found in article 9, ACHR, the Commission declared that no supervisory human rights body had found, so far, any exigence in a state of emergency that demands certain basic fair trial safeguards, including the presumption of innocence, to be suspended.[72]

Enforcing the presumption of innocence has been a challenge in practice, though. The numerous instances of inquisitorial proceedings, in which the burden of proof fall on the accused demonstrates how damaging to the fairness of a trial.[73] It is worthwhile to note, though, that many NSAGs have strived to ensure the respect for the accusatory system, at times even formally recognising this guarantee in their legislations.[74] An additional issue, faced not only by some courts in NSAG territory, but also fairly common in authoritarian regimes, is the interference in judicial affairs by senior members of the NSAG, expressing views in relation to the accused or the case before or during the trial. Not only that, but the need to respect the accused's presumption of innocence is also extensive to the adjudicator, and even to the conditions in which they are presented. This would include wearing prisoner clothing, being kept in a cage or other enclosed areas implying the risk posed by the

[71] Inter-American Commission of Human Rights, *'Report on Terrorism and Human Rights', supra* at 31, pars. 245-247.
[72] *Ibid.*
[73] Plenty of examples can be found in reports and the news, but see, for example, Human Rights Watch, *Between Two Sets of Guns – Attacks on Civil Society Activists in India's Maoist Conflict* (Human Rights Watch 2012), 19.
[74] Andre Le Sage, *Report: Stateless Justice in Somalia – Formal and Informal Rule of Law Initiatives* (Centre for Humanitarian Dialogue 2005), 31; The Constitution of the Republic of Somaliland *supra* at 45, article 26(3); and Kurdish Institute Brussels, '*Charter of the social…', supra* at 46, article 64.

individual, and even presenting the accused in handcuffs during the trial without necessity.[75]

Finally, it could also be considered a violation of the presumption of fair trial an unjustified delay in carrying out the judgement of an individual maintained in preventive detention. Much like in situations where unreasonable delays in reviewing security detentions, as discussed in Chapter 5, could be considered instances of indefinite detention, extending one's preventive detention beyond what is generally accepted could be considered a punitive act, and as such, a violation of one's presumption of innocence.[76] Being a punitive act inflicted upon an innocent person, there is no doubt that this situation would also be a violation of the non-derogable right of humane treatment.

### *3.D. Preparation of the defence*

The guarantees established in article 14(3) of ICCPR work as a set of tools applicable in the course of one's defence, therefore they will be grouped in this section. Despite the IHRL being considerably different from the undefined provision in IHRL of NIAC, *'all necessary rights and means of defence'*,[77] Provost very observantly notes that there are a few elements that are identified as a rights and means of defence. These elements include the right to counsel, to present a full

[75] Human Rights Committee, *Karimov and Nursatov v. Tajikistan* Communication No. 1108 & 1121/2002, 27 March 2007, par. 7.4; René Provost, *Rebel Courts: the administration… supra* at 5, 319-321.
[76] Louise Doswald-Beck, *Human rights in times … supra* at 1, 347. See the decisions of the Inter-American Court of Human Rights, *Case of Suárez Rosero v. Ecuador,* Judgement (merits), 12 November 1997, pars. 76-78; as well as Inter-American Commission of Human Rights, *Giménez v. Argentina*, case no. 11.245, report no. 12/96, §§ 113-114; and *'Bronstein and others v. Argentina'*, cases no. 11.205, 11.236, 11.238, 11.239, 11.242, 11.243, 11.244, 11.247, 11.249, 11.248, 11.249, 11.251, 11.254, 11.255, 11.257, 11.261, 11.263, 11.305, 11.320, 11.326, 11.330, 11.499, 11.504, report no. 2/97, pars. 43-52.
[77] Article 6(2)(a), Additional Protocol II.

defence, to a public trial, and the prohibition of double jeopardy.[78] While the different approaches to this specific array of judicial guarantees was deliberate in relation to IACs,[79] the silence in relation to NIACs points to, if not an acquiescence, at least an indication that a parallel between IHRL and IHL of NIAC guarantees can be established.

The norms espoused in article 14(3) are quite extensive, including roughly a) to be informed promptly of the charges against oneself; b) to have the appropriate time and facilities, as well as appropriate means of communication with their defendant; c) to be tried without undue delay; d) to be present at their own trial, to legal counsel; e) to present and to cross-examine the prosecution's witnesses; f) to be assisted by an interpreter if necessary; and g) not to be compelled to confess guilt. Although complex and open to lengthy discussions, due to the brevity of this thesis, these rights will be grouped into overlapping topics for the discussion below, the relevant points relating to prosecution by NSAGs being addressed.

### *3.D.1. Right to be promptly informed of charges against oneself, and to be assisted by an interpreter*

The right to be informed of the charges brought against oneself is a widely recognised as an indispensable judicial guarantee, being present in all the major IHRL instruments.[80] Although similar, this right is not related to the right to be tried within a reasonable time. It is submitted that the accused has the right to be informed not only of the charges, but also of the reasons leading the prosecution to reach such a conclusion, including the relevant evidence, as well as the appropriate typification. This information must be presented in a clear and complete manner,

[78] René Provost, *Rebel Courts: the administration… supra* at 5, 321-323.
[79] *ibid.,* 321-322.
[80] For example, article 14(3)(a), ICCPR; article 8(2), ACHR; article 6(3), ECHR; and African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right, supra* at 36, 13.

providing sufficiently detailed evidence as to allow the accused to formulate an effective defence.[81]

While the issue of legal certainty has been an issue for a part of the scholarship,[82] I submit that, by applying the principle of domestic prescriptive jurisdiction to NSAGs, the issue can be considerably simplified. Instead of having different laws being applied by different groups on the same territory, having NSAGs adopt the parent state's legislation would enhance the population's right to a fair trial, as it would set a standard typification and prevent arbitrary, and sometimes contradicting legislation.

As explicitly stated in ICCPR, this information must be done as soon as the individual is formally charged or named as the alleged perpetrator. This means that this information can be transmitted orally, as long as it is later confirmed in writing, or directly in written form. In cases of judgements *in absentia*, it is crucial that all the possible steps are undertaken to inform the accused of the charges.[83]

Finally, there is an overlap between the right to have this this information conveyed in a language that is understood by the defendant and the right to be assisted by an interpreter, if necessary. While the requirement of being informed in a language that is understood by the defendant is clear-cut, the right to an interpreter is more problematic. Despite the efforts to include both oral and written manifestations in the

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[81] This is the understanding of the Inter-American Court of Human Rights, which was espoused in *Case of Tibi v Ecuador*, judgement (preliminary objections, merits, reparations, and costs), 7 September 2004, par. 187; *Case J. v. Peru*, judgement (preliminary objections, merits, reparations, and costs), 27 November 2013, par. 199; *Case of Barreto Leiva v. Venezuela*, judgement (merits, reparations, and costs), 17 November 2009, par. 28; and *Case Maldonado Ordoñez v. Guatemala*, judgement (preliminary objections, merits, reparations, and costs), 3 May 2016. The jurisprudence of the European Court of Human Rights is similar. For instance, see *Pélissier and Sassi v. France*, judgement, application no. 25444/94, 25 March 1999, par. 84.

[82] See for instance, René Provost, *Rebel Courts: the administration… supra* at 5, 315-317; and Ezequiel Heffes, *Detention by Non-State… supra* at 29, 82-87.

[83] This understanding is reaffirmed by the Human Rights Committee in its General Comment No. 32, supra at 39, par. 31.

scope of this right, the latter part was narrowly defeated twice.[84] As a consequence, it could be understood that, with the exception of the charges brought against the defendant, only the oral proceedings are protected by article 14(3)(f). While this does not pose an overwhelming problem in a few scenarios, such as some instances of disciplinary trials, the initial review of security detention in particularly precarious situations, or even in places where oral, customary law is applied, these are the exceptions to the rule. In most settings, which invariably include written motions, statements, evidence etc, it is hard to support that the an appropriate defence can be prepared without full understanding of the documentation relating to the case. In this sense, regardless of the capacity of the NSAG, it is very hard to defend that, under the proposed gradated approach, an individual was submitted to a fair trial if they are unable to understand the material submitted to the court.

### *3.D.2. Right to have the appropriate time and facilities, means of communication with the defendant, to be tried without undue delay, and to legal counsel*

Probably the most context-dependent set of judicial guarantees, the right to appropriate time and facilities for the preparation of their defence, can nevertheless be respected even by NSAGs with the lowest levels of organisation. While on one hand there is no established period that would be considered ‘adequate’, it falls upon the defence the obligation to request the adjournment of a trial if the period is insufficient to prepare an appropriate defence. The obligation of the defence to request additional time is completement by the obligation on the part of the adjudicator to grant adjournment requests. The number of adjournments and the amount of time in each one is subjected to the complexity of the case and the

[84] Manfred Nowak, *U.N. Covenant on Civil… supra* at 37, 343.

seriousness of the offence.[85] The same can be said in relation to the facilities, which includes the necessary documents, records, and other material elements in full equality with the prosecution, particularly any exculpatory evidence.[86] Very importantly, the right to communicate with counsel must invariably be respected in relation to the confidentiality between the counsel and their client, without any undue influence, external pressure, or other elements that could negatively influence the quality of one's defence.[87]

As discussed in Chapter 4, in particularly precarious situations such as prosecutions by NSAGs usually are, it is very important that the adjudicator recognises the hypossufficiency of the accused and be tolerant in relation to the timeframe established for the judgment. As several additional challenges may be presented to the defence, which could include the difficulty in accessing the location of the trial on the legal counsel's side, the unavailability of research materials, the difficulty in providing an interpreter, there is a greater obligation on the part of the court not only to provide additional time, but also to cooperate with providing the necessary materials or a private location for client-counsel meetings, so the defence can be exercised in equality with the prosecution.[88]

Another element that is highly context-dependent is the right to counsel. This judicial guarantee in itself can be divided into a subset of rights, including the right to exercise one's own defence in person, if that is one's preference; to choose one's

[85] United Nations Human Rights Committee, *General Comment No. 32 (Article 14)…, supra* at 39, par. 32. See also Sarah Joseph and Melissa Castan, *The International Covenant… supra* at 43, 481.
[86] United Nations Human Rights Committee, *General Comment No. 32 (Article 14)…, supra* at 39, par. 33; Manfred Nowak, *U.N. Covenant on Civil… supra* at 37*,* 332; and Sarah Joseph and Melissa Castan, *The International Covenant… supra* at 43, 483.
[87] United Nations Human Rights Committee, *General Comment No. 32 (Article 14)…, supra* at 39, par. 34; and Sarah Joseph and Melissa Castan, *The International Covenant… supra* at 43, 484.
[88] United Nations Human Rights Committee, *General Comment No. 32 (Article 14)…, supra* at 39, par. 32.

counsel; to be informed of the rights to counsel, to receive free legal assistance if the defendant so require; as well as to be tried in one's presence, the last of which will be addressed in the next subsection.[89] Although the choice to exercise their own defence is available to defendants in criminal and disciplinary proceedings, as well as during the review of one's security detention, there is an overall understanding that a compromise between the right to self-representation and the seriousness of the charges should be taken into account.[90] Regarding the definition of 'legal assistance', Provost makes an important observation. The idea of 'legal counsel' does not necessarily mean a person with formal legal education, although this was the idea at the time of the drafting of the Covenant. Nevertheless, in many scenarios, the participation of a traditional lawyer would not be the most effective mean of defence. Since justice systems may vary widely from state to state, or even from region to region, it is important to secure a counsel who is capable of preparing an appropriate defence. This means, for instance, that when facing a religious court, such as the Shari'a courts in Afghanistan, a defendant might be better equipped with a counsel who has religious training, or in the case of a customary court, an elder or another authoritative figure with knowledge of the local customs.[91] It is an obligation of the court to identify an inadequate defence, which would include to procure a more appropriate counsel to the case at hand.

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[89] Manfred Nowak, *U.N. Covenant on Civil… supra* at 37*,* 337-338.

[90] See for instance, in the context of the Inter-American system of human rights, Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, judgment (merits), 29 July 1988, par. 154; *Case of Barreto Leiva v. Venezuela*, *supra* at 82, par. 53; and *Case J. v. Peru*, *supra* at 82, par. 206. In the context of the European system of human rights, see European Court of Human Rights, *Case of Ibrahim and Others v. The United Kingdom*, applications nos. 50541/08, 50571/08, 50573/08 and 40351/09; 13 September 2016, pars. 250-250; *Case of Mayzit v. Russia*, application no. 63378/00, 20 January 2005, pars 77, 79; and European Commission of Human Rights, *Case of Elvan Can v. Austria: Report of the Comission,* application No. 9300/81, 12 July 1984, par. 48. For a doctrinal analysis, see Juana María Ibañez Rivas, 'Artículo 8. Garantías judiciales' *supra* at 42, 297-298; and European Court of Human Rights, *'Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (criminal limb)*, last updated 31 August 2022, par. 394.

[91] René Provost, *Rebel Courts: the administration… supra* at 5, 325-327.

As a result of these considerations, we have that the right to be tried without undue delay is dependent on the elements discussed above. Even though it explicitly protects the defendant from undue delay, this judicial guarantee is also understood as a protection against an unreasonably speedy trial, as developed in the context of the ACHR and the ECHR.[92] In this sense, while a simple initial detention review should require significantly less time than a capital judgement, it should nevertheless not be as speedy as to prevent the defence from analysing evidence and preparing a defence. Once again, in the same manner that an undue delay might be considered a punitive measure, and therefore a violation of the presumption of innocence, an unreasonably speedy trial is a violation of the principle of equality of arms.

### *3.D.3. Right to be present at their own trial, to present and to cross-examine the prosecution's witnesses, and not to be compelled to confess guilt*

The last set of judicial guarantees relates to the concept of parity of arms in judicial procedures, and do not pose much of a problem from a NSAG perspective. In relation to the right to be present at one's own trial or to have their counsel attend the proceedings on their behalf, the interpretation of the right is quite straightforward. As a rule, trials *in absentia* should be the exception, and only be carried out when the accused has been appropriately summoned, following the right to be informed of the charges against oneself.[93] An additional safeguard recognised by the HRC is that, in order to remedy a violation of fair trial, the accused, once present, should have the right to a retrial.[94] This last consideration should be pondered against the feasibility of doing so in unstable situations such as a NIAC. In these situations, a compromise

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[92] United Nations Human Rights Committee, *General Comment No. 32 (Article 14)…, supra* at 39, par. 35; Juana María Ibañez Rivas, 'Artículo 8. Garantías judiciales' *supra* at 42, 282-286; European Court of Human Rights, *'Guide on Article 6…', supra* at 90, pars. 331-332; Manfred Nowak, *U.N. Covenant on Civil… supra* at 37*,* 333-334; and Sarah Joseph and Melissa Castan, *The International Covenant… supra* at 43, 484-485.

[93] Human Rights Committee, *Mbenge v. Zaire*, communication no. 16/1977, 25 March 1983, par. 14.1

[94] Human Rights Committee, *Ali Maleki v. Italy*, communication no. 699/1996, 27 July 1999, par. 9.5.

between the possibility of holding another trial, ensuring the respect for all the applicable judicial guarantees, and the severity and complexity of the case struck. Once again, a good comparator would be a disciplinary trial versus a trial that could potentially lead to capital punishment. In the first case, a trial in *absentia*, although not ideal, would not generate an invincible violation of fair trial guarantees, especially if the consequence is pecuniary, or of another nature not involving deprivation of liberty. On the other hand, it would be very unlikely that a trial in *absentia* leading to a death sentence could retain its legitimacy.

Initially, the right to present and cross-examine witnesses seems like a challenge in situations of particularly restricted territorial control, as NSAGs may not be able to procure the required witnesses, particularly if they left the group's territorial control and are unwilling to testify. But, considering that these guarantees are predominantly a tool to ensure parity of arms in prosecution, the right exercised in this case is not to present witnesses, but to be able to present witnesses between defence and prosecution.[95] In this sense, whenever a side to the proceedings is unable to produce witnesses, the other should also be unable to do so.

A final guarantee in this category is the right not to be compelled to confess guilt. Although not considered non-derogable, it is abundantly clear that violating this provision would almost always be also a violation of the non-derogable right to be free from torture, as these confessions would most likely occur due to some form of coercion amounting to torture, inhuman, or degrading treatment. The nature of this coercion, as understood by the HRC, would include the indirect physical violence, or undue psychological pressure, particularly in a situation where the defendant is not

[95] Sarah Joseph and Melissa Castan, *The International Covenant… supra* at 43, 499-500; and Manfred Nowak, *U.N. Covenant on Civil… supra* at 37, 341.

assisted by legal counsel.[96] Additionally, whenever there is a claim of torture on the part of the accused, the burden of proof rests on the detaining authority to investigate and demonstrate that such claim in unfounded.[97] As discussed above, in relation to the right to legal counsel, this concept should be viewed with certain flexibility when dealing with NSAGs, as the kind of counsel most appropriate – as well as available – to the defendant could be different from those expected in normal situations. The possibility of having someone with sufficient authority and knowledge of the applicable rules should suffice, when addressing the prevention of torture, considering that the burden of proof falls on those carrying out the detention and interrogation.

### *3.D.4. The shared responsibility between states and NSAGs in the provision of means of defence*

A very important element of subjecting prosecutions by NSAGs to IHRL instead of IHL, is that the obligation to provide the necessary means of defence do not fall on the prosecuting group alone, but it is also shared with its parent state. As proposed by Murray, the context-dependent content of IHRL obligations of NSAGs must be analysed in tandem with states' obligations to their own populations.[98] Using the framework of respect, protect, and fulfil, initially conceived to be applied to economic, social and cultural rights,[99] the realization of judicial guarantees can be implemented more efficiently. While at first, the idea of having states cooperating with NSAGs in

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[96] United Nations Human Rights Committee, *General Comment No. 32 (Article 14)…, supra* at 39, par. 41.

[97] Inter-American Court of Human Rights, *Case of Cabrera García and Montiel Flores v. Mexico*, judgement (preliminary objection, merits, reparations and costs), 26 November 2010, par. 136; Human Rights Committee, *Singarasa v. Sri Lanka*, communication no. 1033/2001, 23 August 2004, par. 7.4; Human Rights Committee, *Kelly v Jamaica,* communication no. 253/1987, 10 April 1991, par. 7.4; and United Nations Human Rights Committee, *General Comment No. 32 (Article 14)…, supra* at 39, par. 41.

[98] Daragh Murray, *Human Rights Obligations… supra* at 7, 180-197.

[99] Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, E/C.12/2000/4, 11 August 2000, pars. 30-37.

providing services within rebel territory may sound utopian, or in the best-case scenario highly unlikely, there are a great number of instances in which this has happened. For instance, before being recognised as an independent state, South Sudan, under SPLA administration, had its judicial system recognised by Sudan, after receiving support from the UN.[100] This was also the case for a brief period after the Hamas' takeover of the Gaza Strip from the Palestinian Authority, civil servants, including those in the judiciary and religious mediation courts, kept being paid by the recognised government, until being replaced by Hamas affiliated personnel.[101] Cooperation has also been implemented more broadly. The Pakistani Taliban, for instance, reportedly shared the administration of the state of Waziristan with the government of Pakistan,[102] and the government of Sri-Lanka engaged in long-term power sharing with the LTTE, with both sides of the conflict providing public services in rebel-controlled territory.[103]

In order to comply with their obligations to respect, protect, and fulfil their population's human rights, states should, for example, refrain from criminalising civil servants acting in former state courts for cooperation with NSAGs. The same would apply to formally trained lawyers, who should also not be barred from entering NSAG territory to represent their clients. Going a bit further, states could also pay judiciary employees to maintain their judicial structures in NSAG-controlled territory, if an agreement between can be struck to uphold the state's legislation. By recognising that different contexts allow for different arrangements, the opportunities for the cooperation between the parties to the conflict in matters of justice can only benefit

[100] Jan Willms, 'Justice through Armed Groups' Governance – An Oxymoron?' (2012) 40 *SFB-Governance Working Paper Series*, 22.
[101] Björn Brenner, *Gaza under Hamas – From Islamic Democracy to Islamist Governance* (I.B. Tauris 2017), 141-143.
[102] International Crisis Group, *Pakistan's Tribal Areas: Appeasing the Militants* (2006), 20-23.
[103] Zachariah Cherlan Mampilly, *Rebel Rulers – Insurgent Governance… supra* at 45, 94.

the civilian population. The fears of legitimising NSAGs by collaborating with them are, should be perceived, as unfounded, as was amply discussed throughout this thesis.

### *3.E. Right to appeal a decision*

Perhaps the greatest difference between the application of IHRL and IHL of NIAC in judicial guarantees is the issue of the right to appeal. While the right to appeal a decision is considered an inherent element of fair trial, under IHRL,[104] there is no such guarantee under IHL of NIAC. Article 6(3) of APII stipulates the right to *'be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.'* As pointed by Provost, the obligation to be advised on judicial and other remedies does not equate to the right to have these remedies. Therefore, under IHL of NIAC, the defendant is entitled only to be informed of whether there is any available recourse to the decision, an information that could easily be that there is no recourse.[105]

Following the requirements established by the *Mapuche* case at the IACHR, an appeal must be ordinary, meaning that it must be already established before the decision becomes *res iudicata*; accessible, with minimum formalities as to facilitate its use; as well as available to anyone being sentenced. An appeal must also be effective, and as such be realistically capable of reversing the appealed decision, as well as guaranteeing a comprehensive analysis of the judgement that is being appealed. Finally, the same minimum procedural guarantees observed during the

[104] Inter-American Court of Human Rights, *Case of Norín Catrimán et al. (Leaders, members and activists of the Mapuche indigenous people)*, judgement (merits, reparations and costs), 29 May 2019, pars. 183-188, 268-270.
[105] René Provost, *Rebel Courts: the administration… supra* at 5, 350-351.

first instance decision.[106] A relevant caveat is made to the right to appeal, though. According to the HRC, this judicial guarantee is only applicable to criminal convictions.[107] Although this goes against the understanding of the African Commission on Human and Peoples' Rights,[108] which establishes this guarantee even for civil cases, this seems to be the minoritarian position, as both the IACHR[109] and the ECoHR[110] seem to support the HRC position. The practical effect of this restriction means that, although a recognised right in cases of criminal nature, and indispensable in capital cases,[111] the same is not true for administrative or disciplinary cases. Consequently, the right to appeal would not cover decisions reviewing one's detention nor a conviction at a disciplinary trial, unless this NSAG is bound by the legislation of a parent state which is a signatory of the ACHPR.

### *3.F.* Ne bis in idem

Similarly to the right to appeal a decision, the prohibition of double jeopardy is a guarantee only applicable to criminal proceedings,[112] and as such, it does not cover convictions at disciplinary trials. It is important to highlight that the understanding of what is covered by the principle of *ne bis in idem* is not uniform. The guarantee of *ne bis in idem* is understood by the ICCPR, the ECHR, and the ACHPR, as protecting

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[106] Inter-American Court of Human Rights, *Case of Norín Catrimán et al. (Leaders, members and activists of the Mapuche indigenous people)*, *supra* at 104, par. 270; and René Provost, *Rebel Courts: the administration… ibid.,* 351.
[107] United Nations Human Rights Committee, *General Comment No. 32 (Article 14)…, supra* at 39, par. 46; See also, Human Rights Committee, *I.P. v. Finland*, communication no. 450/1991, 26 July 1993, par. 6.2.
[108] African Commission on Human and Peoples' Rights, *Purohit and Moore v. The Gambia*, communication no. 241/2001, 29 May 2003, pars. 70-72.
[109] Inter-American Court of Human Rights, *Case of Norín Catrimán et al. (Leaders, members and activists of the Mapuche indigenous people)*, *supra* at 105, par. 269.
[110] European Court of Human Rights, *Moreira Ferreira v. Portugal (no.2)*, application no. 19867/12, 11 July 2017, pars 60-61.
[111] United Nations Human Rights Committee, *General Comment No. 32 (Article 14)…, supra* at 39, par. 46.
[112] Manfred Nowak, *U.N. Covenant on Civil… supra* at 37*,* 355-356.

an individual from being prosecuted twice by the same offence.[113] The understanding espoused in the ACHR, is significantly different. In these instances, the prohibition of double jeopardy applies to prosecutions relating to the same 'cause.'[114] While the English version of the Convention is not particularly helpful, the Spanish, Portuguese, and French versions are more precise, recognising this prohibition in relation to the facts (*hechos, fatos, and faits*, respectively). Since an individual might commit different offences while engaging in a single conduct, the application of this guarantee within the Inter-American system, although minoritarian, provides a broader protection than the one understood by the ICCPR and the other regional instruments.[115]

A far more complicated factor in the application of the principle of *ne bis in idem* in relation to NSAGs, is the ever-present problem of competing jurisdictions. While it remains clear that the prohibition of double jeopardy is not applicable between different states,[116] the exercise of this judicial guarantee is not so clear in a NIAC. With the exception of NSAGs vested with pseudo-ILP, which are recognised as *de facto* jurisdictions, as explained in Chapter 4, groups in the lower threshold of territorial control are, according to the principle domestic prescriptive jurisdiction, still part of the same jurisdiction as their parent states. While a discussion of all the implications of competing jurisdictions within a NIAC is a relatively unexplored topic, with many aspects to be analysed, due to the brevity of the current thesis, this

[113] Article 14(7), ICCPR; article 4(1), Protocol 7 to the European Convention on Human Rights. 22 November 1984; and African Commission on Human and Peoples' Rights, *Principles and Guidelines…*, *supra* at 36, 17.
[114] Article 8(4), ACHR.
[115] Article 8(4), ACHR. See also Juana María Ibañez Rivas, 'Artículo 8. Garantías judiciales' *supra* at 42, 310-312.
[116] Manfred Nowak, *U.N. Covenant on Civil… supra* at 37, 356.

subject will only be explored briefly.[117] Likewise, the application of the principle of double jeopardy between NSAG jurisdiction and the International Criminal Court will, unfortunately, not be explored.[118] With that in mind, taking into account the idea that states and NSAGs not acting as *de facto states* involved in a NIAC are all within the same jurisdiction, the inescapable conclusion is that, the remaining fair trial guarantees being respected, the principle of *ne bis in idem* would be applicable. The scope of this guarantee would prevent a second prosecution by a NSAG if the individual had already been judged by the parent state or another NSAG, as well as by the parent state in relation to prosecutions conducted by NSAGs.

While this would be a significant leap in the idea of state-NSAG cooperation, even if taking into account the concurrent IHRL obligations shared by these entities, the state would still have an alternative to prosecute individuals already tried in NSAG courts. Even though *a priori* these judgements would be protected by the prohibition of double jeopardy, it is understood that, in certain exceptional circumstances, including serious procedural flaws or the existence of newly discovered facts, a new trial may be admissible.[119] The jurisprudence of the IACHR expands considerably on this idea. Under the ACHR, the prohibition of double jeopardy is not an absolute right, not being applicable where

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[117] For a deeper analysis on NSAG jurisdiction, see René Provost, *Rebel Courts: the administration… supra* at 5, Chapters 1 and 2. Albeit reaching a different conclusion, Provost's examination is extremely detailed and has contributed greatly to the understanding of the issue.

[118] For an in-depth analysis, see Jann Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press 2008), particularly Chapter IV 'Legal Principle and as Criteria for Admissibility'; Alessandro Mario Amoroso, 'Should the ICC Assess Complementarity with Respect to Non-state Armed Groups? Hidden Questions in the Second *Al-Werfalli* Arrest Warrant' (2018) 16 *Journal of International Criminal Justice*; and Gaiane Nuridzhanian, '*Ne bis in Idem* in Article 20(3) of the Rome Statute and Non-State Courts' (2019) 18 *The Law and Practice of International Courts and Tribunals*.

[119] United Nations Human Rights Committee, *General Comment No. 32 (Article 14)…, supra* at 39, par. 56; Manfred Nowak, *U.N. Covenant on Civil… supra* at 37*,* 357; and article 4(2) of Protocol 7 to the European Convention of Human Rights. 22 November 1984.

> *i) the intervention of the court that heard the case and decided to dismiss it or to acquit a person responsible for violating human rights or international law, was intended to shield the accused party from criminal responsibility; ii) the proceedings were not conducted independently or impartially in accordance with due procedural guarantees, or iii) there was no real intent to bring those responsible to justice.*[120]

Therefore, whenever a judgement affected by these flaws, these elements would produce an 'apparent' or 'fraudulent' *res iudicata*.[121] This would provide sufficient leeway for states, not being able to strike an agreement with the opposing NSAGs in sharing the administration of justice, to annul these sentences, as long as any of these elements could be reasonably proven. It is true that this exception would work both ways, but it must be considered that its threshold of application is significantly steeper when raised by NSAGs, as, in these situations, states possess an overwhelmingly superior capacity to dispense justice.

### *3.G. Legality*

The principle of legality has been tangentially addressed in Chapter 4, in the analysis of NSAG legislation. Nevertheless, this important principle requires some further exploration. Alongside with a few other rights, the idea that no one shall be punished for an act or omission that was not a crime at the time it was committed is considered a non-derogable right, as it is clear that no trial could be considered minimally fair if disrespecting such vital guarantee.[122] This status is recognised not only in the ICCPR, but also in all three regional treaties.[123] The principle of legality can be broken down in four elements, being non-retroactivity, certainty, the prohibition against analogy, as well as the prohibition against unwritten criminal

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[120] Inter-American Court of Human Rights, *Case of Almonacid-Arellano et al. v. Chile*, judgement (preliminary objections, merits, reparations and costs), 26 September 2006, par. 154.
[121] *ibid*. See also, Juana María Ibañez Rivas, 'Artículo 8. Garantías judiciales' *supra* at 42, 310-312.
[122] Manfred Nowak, *U.N. Covenant on Civil… supra* at 37, 358-359.
[123] Article 9, ACHR; article 7 of the European Convention on Human Rights. 4 November 1950; and article 7(2), ACHPR.

laws.[124] Under the principle of domestic prescriptive jurisdiction, NSAGs, by adopting their parent states' legislation, are able to avoid any significant challenges to the realization of this guarantee. Once domestic laws are already in place, are publicly known or accessible to all citizens, possess very few gaps that could be analogised, and are almost certainly written, religious, or customary, their application should be reasonably straightforward. This is particularly useful in 'complex scenarios'[125] in which a NIAC involves multiple NSAGs or the same NSAGs are involved in different NIACs in more than one state. By adopting a single legal system, the population maintains the certainty of which laws are in place, which is crucial in situations where, due to the volatility of the conflict, territorial control shifts constantly between state and NSAGs.

Whilst not posing a problem to most NSAGs, this judicial guarantee can become problematic in situations where these entities develop ILP. In this scenario, a careful observance of the elements of this guarantee should be taken into consideration. In his exploration on NSAG legislation, Provost explains that, when applying their own norms, NSAGs should make sure their laws sufficiently accessible and comprehensive to who it will be applied.[126] In this regard, no prosecution should be based on the newly enacted legislation, if the act has been committed when the previous laws were in place, as was done by Hamas, when it replaced the

[124] Manfred Nowak, *U.N. Covenant on Civil… supra* at 37, 358-359; René Provost, *Rebel Courts: the administration… supra* at 5, 334; and Claus Kreß, '*Nulla Poena nullum crimen sine lege*' *in* Anne Peters (ed), *Max Planck Encyclopedia of Public International Law*, last updated in February 2010, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e854?rskey=4Hevpk&result=2&prd=MPIL> accessed 02 April 2023, par. 1.

[125] As described by Ezequiel Heffes, 'Generating Respect for International Humanitarian Law: The Establishment of Court by Organized Non-State Armed Groups in Light of the Principle of Equality of Belligerents' (2015) 18 *Yearbook of International Humanitarian Law*, 191.

[126] René Provost, *Rebel Courts: the administration… supra* at 5, 82-84.

Palestinian Basic Law by a new sets of customary and religious-based rules.[127] In order to establish the certainty of its legislation, a NSAG must necessarily define precisely all criminal offenses so as to avoid ambiguities or gaps that would allow for analogies.[128] This also includes providing translations for these laws in all the languages spoken within a territory, or in a *lingua franca*, like it is done by the government of Somaliland, who publishes their constitutional and criminal laws in both Somali and English.[129] These laws must not only be precise and understandable, but they also must be properly publicised. The form by which their publication is done varies, and should be better adapted to the each NSAG's context. For instance, while some well-established groups, such as the abovementioned Republic of Somaliland, may be able to disseminate their legal texts via the internet, in other scenarios, such as with the Ejército de Liberación Nacional (ELN) in Colombia, this communication was better done by public announcements in villages.[130] In relation to the prohibition of analogy, as long as new rules are established to close the identified gaps, the requirement does not seem to pose any problem to these groups. Finally, it is important to highlight that the idea that all rules must be written allows for an important exception, which is in relation to customary International Criminal Law.[131] This could be explained by the egregious nature of these crimes, which include acts such as genocide, war crimes,

[127] Björn Brenner, *Gaza under Hamas… supra* at 101, 142-144.
[128] Daragh Murray, *Human Rights Obligations… supra* at 7, 208-209; and Manfred Nowak, *U.N. Covenant on Civil… supra* at 37, 359-360.
[129] The Constitution of the Republic of Somaliland *supra* at 45.
[130] Mario Aguilera Peña, 'Justicia guerrillera y población civil: 1964-1999' (2000) 29(3) *Bulletin de l'Institut français d'études andines'*, 442.
[131] Manfred Nowak, *U.N. Covenant on Civil… supra* at 37, 367-368.

and crimes against humanity, and the unlikeliness that these acts might not be understood as criminal by the average person.[132]

## 4. Conclusion

The topic of judicial guarantees in prosecutions carried out by NSAGs is relatively new, and as such it presents many legal gaps in areas of the utmost importance. Nevertheless, it becomes clear that, by adapting a state's legislation in a IHRL perspective, as well as approaching these rules with a gradated approach in mind, it is possible to find feasible solutions most of the time. Additional arguments for the exclusive application of IHRL to these rights include the equalisation of rights between defendants, which in turn simplifies the procedure by providing a unified framework, as well as the enhanced protection of a more developed set of rules. The apparent limitation of this approach, which is considerably stricter if compared to others found in the scholarship,[133] is tempered by the flexibilization of these standards to provide a nuanced scope of application.

By adopting a progressively strict threshold for the different guarantees, which is regulated by the complexity of the case and the gravity of the consequences, it is possible to establish a system that is realistic, and at the same time protective. The idea that the same standards should be applicable to criminal prosecutions, disciplinary trials, and the review of security detentions ignores a series of important factors, such as their recurrence, the conditions in which these judgements must be carried out at times, as well as the available resources. These factors can also be greatly mitigated by bringing states to the discussion. The existence of concurrent

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[132] *ibid.*

[133] Such as in René Provost, *Rebel Courts: the administration… supra* at 5; Ezequiel Heffes, *Detention by Non-State… supra* at 29; and Jonathan Somer, 'Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict' (2007) 89(867) *International Review of the Red Cross*.

obligations between states and NSAGs in relation to the population provides benefits that vary from allowing for an environment in which rights to fair trial can be effected, to guaranteeing a safety net in case these rights cannot be reasonably complied with.

# Conclusion

## 1. Accepting the progressive role of non-state armed groups in shaping national and international law

As this thesis aims to demonstrate, the growing protagonism of non-state actors, and in this particular case NSAGs, is an undeniable reality. Not only that, but the more the Law in its various fields develops, while these entities' practices are not acknowledged, the greater is their alienation. The most serious consequence of that is not that we might have organisations that are *de facto* states being ignored. Instead, this alienation invariably leads to indifference for the law, and from there, we have indiscriminate violations perpetrated against those that are the most vulnerable in situations of conflict. The effort to provide an acceptable framework of operation for NSAGs when detaining and prosecuting individuals is then, ultimately, an effort towards assuring a humane and dignified treatment to civilians under NSAG rule, as well as fighters who have fallen in the enemy's hands.

Despite the commonly accepted idea that all rebel groups despise the rule of law and act towards civilians with a callous attitude, reality is, as usual, much more complex. As it often happens, NSAGs are entities created as a response to popular demands of, often disenfranchised, groups. This is the case of many of the most high-profile organisations, such as the FARC, Sendero Luminoso, or the Zapatistas in Latin America, which were originally groups formed by the convergence of marginalised peasants and indigenous peoples. Similarly, the LTTE, the IRA, and the Polisario Front, were also part of the very population they intended to rule, being in their interest to develop friendly relations with the population and to demonstrate their capacity to rule. This is translated into real effort to administer a functioning justice system with the resources available, even if these efforts more often than not fail.

So, under this perspective, instead of denying NSAGs' participation in the construction and operation of the law, the international community would greatly benefit from the inclusion of these entities in the development of legal areas that affects them, as well as from capacity-building efforts. This positive impact is very tangible in the work of a few organisations such as Geneva Call, who provides International Humanitarian Law (IHL) training while seeking to secure deeds of commitment against practices such as the recruitment of child soldiers and the use of landmines. This sense of responsibility is apparently sufficient to generate a positive engagement.

Not only that, but by accepting self-imposed obligations by these groups, it is possible to develop mechanisms of control, even if based on mere naming and shaming tactics. This is particularly evident in the case of the Sudan People's Liberation Army (SPLA). After being included in the UN Secretary-General's list of parties to conflict that employ child soldiers, the organisation has strived to ban the practice by establishing an action plan in 2009 and finally reaching an end to the practice in 2012.[1] This was an important step in for the organisation, as it intended to increase its legitimacy and that of its political wing, the Sudan People's Liberation Movement (SPLM).

It is true that these groups, due to the lack of resources or know-how, frequently commit International Human Rights Law (IHRL) and IHL violations, but then, so do most, if not all states. In this sense, refusing to recognise acts as crucial as detaining and prosecuting individuals during an armed conflict, or setting untenable standards

[1] 'UN and Sudan People's Liberation Army (SPLA) sign historic agreement to stop child recruitment and release all children from the national army' (*Reliefweb* 14 March 2012) <https://reliefweb.int/report/south-sudan-republic/un-and-sudan-people%E2%80%99s-liberation-army-spla-sign-historic-agreement-stop> accessed 03 July 2023.

unto these groups for these operations achieves nothing but the furthering of violations and unnecessary suffering. One should just put themselves in the shoes of a NSAG commander. If the efforts to provide for all the necessities of a detainee, and to grant them a fair trial are deemed as much a crime as simply executing these detainees summarily, what motivation do we provide to these leaders to invest resources and personnel in an activity that is invariably illegal?

If the fear of allowing unspeakable acts of violence to be inflicted upon vulnerable groups during armed conflicts is the reason NSAGs are alienated from the law, we must recognise that these actions are the equivalent of trying to put out a fire by dousing it with petrol.

**2. The need for the development of tangible guidelines to NSAGs**

Hand in hand with accepting non-state practice as a means to further the protection of those under the control of these entities, it is necessary to establish a workable set of guidelines applicable to them. By providing tangible standards, it not only becomes easier for NSAGs to comply with the applicable law, but it also allows for stricter accountability mechanisms.

In the course of this thesis, I provided several examples of concrete measures that could be adopted by NSAGs when detaining and prosecuting individuals, as well as elements that should be taken into account when analysing the potential legality of these actions. These measures are all either an adaptation of existing norms, applicable to states and already developed by the scholarship, or an attempt to reconcile core obligations found in IHL and IHRL with the understanding that most, if not all, of these groups do not possess the same resources as states.

The main hurdle in providing these guidelines is the wide variety of groups in existence, both from an organisational and a capacity standpoint. While some groups, such as the Republic of Somaliland, intend on founding a new state, with its own legal regime, others, such as the Libyan National Army, either claim to be or try to become the legitimate government, merely taking control of an already existing legal order. In the first case, drawing parallels between the secessionist group and the state's legislation in order to assess the legality of their conduct is not the most appropriate approach. On the other hand, when analysing the conduct of a group attempting a coup d'état, one must take into consideration that, while it might intend to perpetuate an established structure, it could also change (sometimes drastically) the existing order. Similarly, it would be unhelpful to hold groups such as Abu Sayyaf against the same standards that are expected of fully recognised states. This sort of comparison would be more appropriate when examining the conduct of groups such as Hezbollah.

In this sense, the sliding-scale of obligations approach is a very useful tool in balancing the obligations against the capacity of a specific group. The one-size-fits-all approach is unhelpful even when applied to address states, and it is even more inadequate when trying to fit amorphous entities such as NSAG into a mould. By making a case-by-case analysis of a group, taking into account the context in which the NSAG is included against the minimum core obligations that need to be complied with, it is possible to achieve tailored answers. These may take the form of existing approaches found in different legal systems, such as adopting a hypossufficiency approach to NSAG prosecutions, as well as creative solutions, such as embracing technological advancements to facilitate evidence gathering and research, or even to conduct online hearings whenever possible.

With sufficient precedential examples, and a more developed framework for the adoption of the sliding-scale methodology, it might even be possible, in cooperation with NSAGs, to establish benchmarks of progressive realisation, much like it is done with states. To achieve this, not only will it be necessary to develop the theory, but also to adopt a cooperative approach between states, NSAGs, and international organizations, such as the International Committee of the Red Cross (ICRC) or the United Nations.

### 3. The need for a greater cooperation between states and NSAGs in realising rights in rebel occupied territory

In relation to cooperation, one aspect that cannot be overstated is the concurrent obligation states and NSAGs have to protect the civilian population. Even with the total displacement of state authority from a part of its territory, it remains an obligation of the government to undertake all possible efforts to guarantee the population's rights, be it by respecting, protecting, or fulfilling them.

Although at first it is difficult to imagine any cooperation between warring parties in a civil war, these agreements are a relatively common practice. This cooperation between states and NSAGs, which is most commonly observed in relation to health and education-related matters, could be extended to other matters, such as to detentions and prosecutions. Rather than legitimising these non-state actors, governments would be instead ensuring that the population under the control of entities deemed to be terrorist organisations still have access to state protection, and in this sense, reinforcing its authority over the territory, even if temporarily beyond their control. Moreover, by adopting a cooperative approach, states have the opportunity to maintain an open channel of communication with the rebels, and even influencing their policy by the manner in which this cooperation is conducted. Very

recently, in the context of the COVID-19 pandemic, several NSAGs in countries like Colombia, South Sudan, the Philippines, and Ukraine entered ceasefire agreements in order to facilitate a public health response, with varying degrees of success.[2]

Finally, it is important to highlight that third party support might be a more palatable answer in some scenarios, which does not undermine the importance of the communications between the parties to the conflict. Once again, adopting an inclusive stance toward NSAGs and recognising that cooperation does not equal legitimisation of these groups, has the potential allow for greater compliance in situations such as the mediation of concurrent obligations by a neutral party.

### 4. Areas for further research

During the course of my research, I have come across several relevant issues that, due to their tangentiality in relation to the research questions, or the exiguous word count of the present thesis, were unfortunately not explored. It is nevertheless important to point out these issues given their relevance not only in terms of research, but also of concrete consequences.

While this thesis explored the legal basis and the minimum guarantees for detentions when carried out by NSAGs, an important aspect was left behind. Using the same Sassòlian approach in determining the treatment of detainees would be extremely beneficial. A very recent publication by the ICRC has delved into the topic,[3] providing a series of rules for the treatment of detainees by NSAGs, as well as examples. Nevertheless, as recognised by the publication, the examples used in the study are not representative of all possible scenarios. In order to establish a more

[2] Jori Breslawski, 'Armed Groups and Public Health Emergencies: A Cross-Country Look at Armed Groups' Responses to Covid-19' (2021) 7(1) *Journal of Global Security Studies*, 4; and Tobias Ide, 'COVID-19 and Armed Conflict' (2021) 140 *World Development*, 3-5.

[3] International Committee of the Red Cross, *Detention by non-state armed groups – Obligations under international humanitarian law and examples of how to implement them* (ICRC 2023).

comprehensive approach, further research on minimum core obligations in detention standards would be quite beneficial.

Another particular issue in detentions by NSAGs concerns the care of particularly vulnerable groups, such as children, women, the elderly, and minority groups. Another cutting-edge piece has been published by Sandesh Sivakumaran on the detention of particularly vulnerable persons.[4] As pointed out by Sivakumaran, the regulation of detention is particularly precarious in Non-International Armed Conflicts (NIACs), and the problem is compounded when taking into consideration NSAGs conduct. He proposes as a possible solution an approach similar to the methodology used in this research. Nevertheless, considering his approach is limited to IHL, there is much to be explored, particularly if taking IHRL into account.

Similarly, when addressing more developed organisations that regularly detain not only fighters, but also civilians uninvolved with the conflict, there is the ever-present risk of radicalisation, such as it happened in detention centres in Syria. Mingling NSAG members and the regular population has the potential to create unintended recruitment foci, as noted by the United Nations Office on Drug and Crime.[5] This is particularly important in scenarios with various conflicting parties, such as the conflicts in the DRC, Libya, and Syria, where secular and fundamentalist NSAGs face each other for territorial control.

Shifting the focus to prosecutions, although a somewhat settled issue, the complementarity between rebel jurisdictions and domestic and international courts does deserve further examination. Particularly after the *Sakhanh* decision,

[4] Sandesh Sivakumaran, 'Armed Conflict-Related Detention of Particularly Vulnerable Persons: Challenges and Possibilities' (2018) 94(39) *International Law Studies*.
[5] United Nations Office on Drug and Crime, *Handbook on the Management of Violent Extremist Prisoners and the Prevention of Radicalization to Violence in Prisons* (United Nations 2016).

acknowledging the legitimacy of NSAG jurisdictions becomes a pressing matter. Declaring all instances of prosecution by NSAGs illegitimate unintentionally provides encouragement for show trials or summary executions. Criminal procedures from these actors which are deemed to comply with the required standards of fairness should be recognised, as it would avoid *de facto* double-jeopardy, as well as being an efficient instrument in post-conflict reconciliation and transitional justice, particularly if the insurgents succeed in toppling the government or establishing their own state.

Finally, being quite a versatile tool, the sliding-scale of obligations approach could potentially be used in other areas of NSAG practice, which are also considerably under-researched. For instance, extending the rising environmental concerns to the conduct of these non-state actors could allow for greater oversight outside the limits of IHL of extractivist activities carried out by these groups, such as oil extraction, mining, and poaching. Similarly, after events such as the destruction of the Buddhas of Bamiyan by the Taliban or Palmyra by the Islamic State, engaging NSAGs in their obligations to respect and protect cultural heritage is undoubtedly a critical matter.

## 5. Detention and prosecution by NSAGs: understanding the legal bases and applying procedural and judicial safeguards

Throughout the course of this research, I attempted to answer a few questions that still raise highly contentious discussions both among scholars and legal practitioners.

The first question, whether there is a legal basis for detentions by NSAGs in international law, was the main subject of chapter 3. Contrary to many prominent theories, the chapter concludes by determining that, there is no legal basis for detentions by NSAGs in international law. States did not intend to regulate detentions in NIAC via international law, as they understood the issue as being a

domestic matter. While the issue was clearly resolved for governments, since there is little doubt about the application of their own legislation in these situations, this only brought confusion when addressing NSAGs. Instead of relying on a hypothetical implicit authorisation in international law to settle the issue, the most realistic option seems to be the application of the prescriptive jurisdiction theory to these groups. This does not only provide a more grounded answer, but it also allows for a much more coherent system, in which NSAG obligations mirror those of states, providing a symmetric system to some extent. This would mean that, until the NSAG manages to completely displace state authority and becomes an entity with *de facto* international legal personality, it is bound by the same rules applicable to its parent state.

By adopting this approach, it was also possible to answer the second question, that was proposed in chapter 4: whether there is a legal basis for prosecution by NSAGs in international law. Once again, there is no basis for these conducts in international law, as prosecutions during NIACs were seen as a private matter of each state. This view has also allowed a clear delimitation of what constitutes the requirements of a ‘regularly constituted court’ or a ‘court offering the essential guarantees of independence and impartiality’, as required by Common Article 3 (CA3) and Additional Protocol II (APII) respectively.

Perhaps the main contribution brought by this attempt at locating the legal basis for detentions and prosecutions by NSAGs is the identification of a strong correlation between the two. While the doctrine on these tools of governance being used by NSAGs is exiguous, there is no in-depth study which take these elements as clearly connected. As comprehensive as it may be, any analysis of detentions or prosecutions individually retain significant blind spots, such as the procedure for reviewing detentions and nature of this reviewing body. Hopefully, the concomitant

study of the legal bases for detention and prosecution allowed for a clear evaluation of these intersections.

Discussing abstract issues such as the existence of a legal basis for NSAGs to detain and to judge individuals may look at a first glance as a futile academic exercise. Research for the sake of research. It is nevertheless a fundamental task, which generates huge consequences in the protection of those individuals subjected to these groups. By delimiting in a clear, and most importantly, realistic manner, the legal framework applicable to these situations, the rights and obligations associated can be accurately determined.

By providing a legal basis for detentions and prosecutions, the next step in the analysis of rebel rule of law, and the question that was examined in chapter 5, is, in the absence of a legal basis for detentions by NSAGs in international law, how are the procedural safeguards involved in these operations determined?

Once again, IHL is not very helpful. While CA3 and APII do provide some guidance on the treatment of detainees, the content of these norms in relation to procedural safeguards is limited. As such, once again, a more comprehensive framework can be found in IHRL, particularly, in article 9 of International Covenant on Civil and Political Rights (ICCPR). The guidelines provided by ICCPR, aided by the interpretation of relevant jurisprudence, allows us to draw a parallel for the application of procedural safeguards in detention to NSAGs. The adoption of a sliding-scale of obligations is also helpful when addressing the different types of detention that may arise in the context of NSAG rule, *i.e.,* administrative detention, pre- and post-trial detention, and disciplinary detention.

As mentioned above, the intersection between detention and prosecution becomes particularly relevant. During a period of deprivation of liberty, a detainee must have the right to challenge the grounds of their detention, as well to request a periodic review. Here, the reviewing procedure must include a clearly defined procedure, as well as an appropriate reviewing body. Although equally important, particular attention must be given to potentially indefinite detentions for security reasons and their periodic reviews.

Finally, the last question, that since there is no legal basis for prosecution by NSAGs in international law, how are the judicial guarantees applicable to these procedures to be determined, was discussed in chapter 6. This is, by far, element that, on its own, has received the least amount of attention by the scholarship, and which this thesis hopefully provided the most substantial contribution.

One of the gravest problems in working with different legal regimes of prosecution is the risk of creating an asymmetric system and providing insufficient protection to individuals being tried by NSAGs by the most varied reasons. For this reason, the application of the principle of Untermaßverbot – quite literaly, the principle of the prohibition of insufficient protection – is particularly beneficial.

As the discussion on the judicial guarantees during prosecution are a matter of domestic legislation, by extending the most protective set of norms in a national legal order, which are the existing IHRL standards, guarantee an equal treatment regardless of the nature of the charges and the consequences of a conviction. The use of the sliding scale of obligations in this situation would serve as the fine-tune instrument to determine the scope of these guarantees. This would add another layer of protection that, if it does not prevent situations such as the ones from the

*Sakhanh* and *Bemba Gombo* cases, can at least provide an additional obstacle to such blatant violations of the right to a fair trial.

Another preventative measure that can be taken from the application of a NSAG's parent state's legislation, via prescriptive jurisdiction, is the prohibition on the application of the death penalty in an indiscriminate manner. Although dependant on the state's stance on capital punishment, establishing a system that mirror states' norms provides clarity on what conduct should lead to a death penalty conviction, which would in turn demonstrate the need for a stringent application of the necessary judicial guarantees to the case.

Perhaps in a less academic and more policy-based analysis, it is important to highlight the already mentioned need for a greater collaboration between states and NSAGs. Such cooperation is in the interest of all those involved. On a state's perspective, there is still an obligation to protect its citizens, regardless of their geographical location within territorial borders. It can also be a clear demonstration of concern with its most vulnerable nationals, instead of a recognition of the authority of the rebels. On a NSAG point of view, this is an opportunity to demonstrate proper administrative capabilities, which is an indispensable attribute of a wannabe government and a display of level-headedness that is incompatible with a 'terrorist organisation'.

Finally, it is important to highlight the importance of the adoption of creative solutions to specific situations. These solutions need not only be of a legal nature, such as the application of the principle of hypossuficiency whenever there is a clear imbalance between prosecution and defence, but it could include measure of a more practical nature, making use of existing technology or mediation between opposing parties.

The main takeaway is that the most beneficial approach in most situations is the contextual application of fair trial guarantees, having the preservation of their core obligations as a paradigm. This may not be the simplest approach, as it requires a fine balance between pragmatism and protection, but it is a substantially more efficient approach than a one-size-fits-all solution, or worse, a blanket prohibition.

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